SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1969

No. 603

ROBERT L. DOWELL, an infant, who sues by A. L. DOWELL, his father and next friend, *et al.*,

and

STEPHEN S. SANGER, JR., on behalf of himself and all others similarly situated,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, *et al.*,

and

JENNY MOTT McWILLIAMS, a minor, and DAVID JOHNSON McWILLIAMS, a minor, who sue by WILLIAM ROBERT McWILLIAMS, their father and next friend, on behalf of themselves and all others similarly situated.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 27, 1969.

Citations to Opinions Below

The oral opinion of the district judge on July 29, 1969, is unreported and is printed in the appendix hereto, *infra* p. 1a. The order of the Court of Appeals of August 5, 1969 (R. 5), is not yet reported and is printed in the appendix hereto, *infra* p. 23a. The district court's opinion of August 8, 1969, in response to the remand is unreported and is printed in the appendix hereto, *infra* p. 25a. The district court order of August 14, 1969, denying a stay pending appeal is unreported and is printed in the appendix p. 36a, *infra*. The Court of Appeals opinion of August 27, 1969, is not yet reported and is printed in the appendix p. 38a, *infra*. The order of September 3, 1969, by Mr. Justice Brennan reinstating the District Court order pending certiorari is unreported and set forth *infra* at p. 44a.

Earlier proceedings in this case are reported as follows:

1. An Order Dissolving Three-Judge Court, of July 10, 1962 is unreported and reprinted in the appendix p. 45a, *infra*.

2. District court opinion of July 11, 1963, reported at 219 F. Supp. 427 (W.D. Okla. 1963).

3. District court opinion of September 7, 1965, reported at 244 F. Supp. 971 (W.D. Okla. 1965).

4. Court of Appeals opinion of January 23, 1967, reported at 375 F.2d 158 (10th Cir. 1967), certiorari denied, 387 U.S. 931 (1967).

Jurisdiction

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 27, 1969 (R. 10; p. 43a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

Questions Presented

1. Whether Negro pupils have been denied Fourteenth Amendment rights to attend desegregated public schools where:

The Oklahoma City school system, which was completely segregated as required by state laws, has since 1963 been ordered to convert to a desegregated system under the continuing jurisdiction of the district court; and

The district court concluded after hearing evidence in July 1969 that the school board's desegregation plan should be amended at the start of the 1969-70 term to enlarge the geographical areas served by two schools to reassign more white students to those schools; and

On the application of intervening white parents for a stay pending appeal, the court of appeals, without a record of the proceedings below or briefs on the merits, summarily vacated the district court order for 1969-70 without any determination that it erred in fact or law or abused its discretion; and

The appellate decision held that: (a) courts should require desegregation only "with all reasonable dispatch" and not immediately; and (b) it was appropriate, when deciding whether to grant a delay, to balance claims of those seeking desegregation against white intervenors' claim of "the constitutional right not to be transported to

another school solely by reason of their race and to achieve a racial balance in the community."

2. Whether the Court below was organized in violation of the prohibitions of 28 U.S.C. §47 in that a member of the court of appeals panel previously heard and decided issues in this same case concerning the adequacy of the school board's desegregation plans as a member of a statutory three judge district court in 1962.

Constitutional Provisions and Statutes Involved

1. This case involves the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves section 407(a)(2) of the Civil Rights Act of 1964, 42 U.S.C. §2000c-6(a), 78 Stat. 248, which provides:

> **§2000c—6. Civil actions by the Attorney General—complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants**
>
> (a) Whenever the Attorney General receives a complaint in writing—
>
> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or
>
> (2) signed by an individual, or his parent, to the effect that he has been denied admission to or not

permitted to continue in attendance at a public college by reason of race, color, religion, or national origin.

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

3. This case also involves 28 U.S.C. §47 (Act of June 25, 1948, c.646, 62 Stat. 872.):

§47. Disqualification of trial judge to hear appeal

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

Statement of the Case

A. *Introduction.*

This case involves the desegregation of the public schools of Oklahoma City, Oklahoma. This class action was filed October 9, 1961, by petitioner, Dr. A. L. Dowell, a Negro parent.[1] Other Negroes intervened supporting the suit,[2] and more recently the Sanger group of plaintiff-intervenors, who join this petition, were added to the case representing white parents supporting the desegregation of the schools. The respondents are both the elected 5 member Board of Education of the Oklahoma City Public Schools, and the McWilliams family, a white family residing in the Belle Isle section who intervened representing a class opposed to desegregation plans affecting their neighborhood.[3]

The present posture of the case is quite unusual. Petitioners seek review of an order of the Court of Appeals for the Tenth Circuit of August 27, 1969, which summarily

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[1] Jurisdiction in the district court was predicated on 28 U.S.C. §1343(3) and 42 U.S.C. §§1981, 1983 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

[2] See, e.g., 219 F. Supp. at 429.

[3] Others who intervened or sought to do so, but are not involved in the recent proceedings are:

(a) The Hendrickson family, a white parents class which has not participated in recent proceedings; and

(b) The Verity and Danzie classes unsuccessfully applied for intervention in August 1969 after the hearing below and orders of the trial court were entered. Permission was denied on the ground that intervention was too late. On appeal to the Tenth Circuit, the denial of intervention was affirmed by order entered August 27, 1969. (10th Cir. Nos. 433-69 and 434-69.)

vacated an order entered in the District Court for the Western District of Oklahoma on August 13, 1969. The trial judge's order approved and required implementation of amendments to the district's desegregation plan when school opened on September 2, 1969. The McWilliams intervenors, but not the school board, promptly appealed to the Tenth Circuit and sought a stay pending appeal. Acting on the stay application, the Tenth Circuit instead summarily vacated the trial court order insofar as it required amendments to the desegregation plan for 1969-70. Then, on petitioners' application, Mr. Justice Brennan, as Acting Circuit Justice, reinstated the district court order of August 13, 1969, pending disposition of a timely certiorari petition to be filed within 15 days.[4]

The school system has thus begun the 1969-70 term in accordance with the district court's requirements. During the stay application in the court of appeals, and before the Circuit Justice, the school board took no part. Belatedly, on the 30th day after the August 13 order (and after that order had been vacated by the court of appeals and then reinstated pending certiorari), the school board on September 12, 1969, filed a notice of appeal from the August 13 order.[5]

The Tenth Circuit order of August 27 was the second time that court vacated the trial judge's order during the month of August. On August 5, 1969, on an earlier stay

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[4] Mr. Justice Brennan's order was dated September 3, 1969. On August 29, 1969, Mr. Justice Brennan had entered a temporary order reinstating the trial judge's requirement until the McWilliams intervenors could file an opposition to the application.

[5] On September 12, the school board also noticed appeal from a September 11, 1969, order of the trial judge refusing to grant the board an extension of time for filing a long-range desegregation plan ordered for November 1, 1969, as to secondary schools, but granting such a request for elementary schools.

application by the McWilliams intervenors, the Tenth Circuit vacated the trial court order and remanded for reconsideration of whether the Civil Rights Act of 1964 barred the trial court integration order first entered on August 1, 1969. As noted above, when the trial court reaffirmed its prior action on August 13, the court of appeals then entered its order of August 27, 1969.

Because of this unusual course of proceedings the record in the court of appeals includes only papers filed in support of the McWilliams group's two stay applications. No record certified by the district court clerk in accordance with the Federal Rules of Appellate Procedure has yet been filed in the Tenth Circuit. Thus, the court of appeals had only a fragmentary record which omits essential evidence, pleadings and orders.

In order to deal with the issues now presented, it will be necessary to review the prior proceedings from the inception of the case in 1961.

B. *Proceedings During 1961-1962 Before Statutory Three Judge District Court.*

Petitioners' argument, infra pp. 27-31, that Judge Murrah was disqualified under 28 U.S.C. § 47 to hear the case below requires a description of the prior proceedings in which Judge Murrah acted as a member of the trial court. The action was commenced October 9, 1961. On October 11, 1961, Chief Judge A. P. Murrah designated a statutory three-judge district court as requested by the complaint which sought injunctions to restrain the enforcement of Oklahoma laws requiring school segregation. Circuit Judge Murrah and District Judges Bohanon and Daugherty were designated to hear the case. A pre-trial order dated January 26, 1962, framed the issues; it is set out in its entirety in the appendix hereto, *infra* pp. 49a to 60a. Briefly sum-

marized, the order indicated that the invalidity of the state segregation laws was admitted by the board, and that the dispute centered on whether the board was unconstitutionally applying the laws governing the assignment of pupils. Plaintiffs contended that the board continued to operate segregated schools, while the board said that it had adopted a good faith desegregation plan which was reasonable and should be approved by the trial court. (See *infra* pp. 57a to 59a.)

Although doubtful of its jurisdiction, the three-judge court convened and held an evidentiary hearing on the merits on April 3, 1962; Judge Murrah presided. On July 10, 1962, the three-judge court was dissolved. It granted no relief but did refer the matter to Judge Bohanon as resident judge. But in the July 1962, order (reprinted in appendix, *infra* pp. 45a to 48a), the three-judge court concluded on the merits that:

> The real question posed by the pleadings is the application by defendants of Section 4-22 of Title 70, Oklahoma Statutes Annotated. Plaintiff admits that this section is Constitutional on its face, but contends that it is unconstitutionally applied. (45a, *infra*)
>
> • • •
>
> Section 4-22, Title 70, Oklahoma Statutes Annotated, authorizes Board of Education "to designate the schools to be attended by the children of the District. (46a, *infra*)
>
> • • •
>
> The plaintiff's evidence failed to show that the above mentioned statute is or was unconstitutionally applied by the defendants.
>
> Under the pleadings and evidence the Court is of the opinion that there is no justiciable controversy pre-

> sented as to any of the constitutional or statutory provisions set out in the plaintiff's first amended complaint, and there remained only for determination the question relating to defendant's application of the above mentioned statute. There was no evidence to show that the unconstitutional provisions of the Oklahoma Constitution and the unconstitutional statutes of Oklahoma relating to segregation of the races in public schools have been used and there is no controversy with respect thereto and nothing to strike down. Under the pleadings there was only the issue as to defendant's application of Section 4-22 Title 70, Oklahoma Statutes Annotated. This issue is a factual one and does not address itself to a three-Judge Court.
>
> It further appears from the evidence that there has been no order made or promulgated by the defendants acting under the above statute, within the purview of 28 U.S. Code Section 2281, which the plaintiff presents or points out to be unconstitutional by discriminating against the plaintiff and his class by reason of race or color. (47a, *infra*)

Thus the court sustained the school board's defense, although it did reassign the case to the resident judge for further proceedings. After the complaint was again amended, the plaintiffs finally got an injunction as described below.

C. *The Case in 1963-1964.*

In 1963, the district court ruled that the defendant school board's minority to majority student transfer policy was designed to perpetuate and encourage segregation and was not a good faith effort to integrate the schools as required by the Supreme Court. 219 F. Supp. 427. The board was enjoined from discriminating and was ordered to file within

90 days a complete and comprehensive plan for the integration of the Oklahoma City public school system, both as to students and faculty. 219 F. Supp. 427, 447-448.

In January of 1964, the school board filed with the court a "policy statement regarding integration of the Oklahoma City public schools." 244 F. Supp. 972. Thereafter, a hearing was had upon the Policy Statement after which the court noted that "the evidence was substantially the same as had been offered to the court prior to the opinion of July, 1963" (*ibid.*). The court directed the board to employ a team of experts, independent of any local sentiment, to make a survey of the problem as it related to the integration of the school system. 244 F. Supp. 972, 973. The board rejected the request and thereafter, at the court's invitation, plaintiffs responded favorably and a team of three "well qualified" experts were appinted by the court and directed to make the study and to report to the court. *ibid.*

D. *The Case in 1965-1968.*

The report was prepared and filed with the court. In approving the report, the court stated that the experts' recommendation of pairing four white and black schools—Harding with Northeast and Classen with Central—was reasonable and educationally sound. 244 F. Supp. 971. The court concluded that its continuing contact with the case for four years demonstrated that the "defendant board has failed to eliminate the major elements of a segregated school system and thereby continued to inflict both the educational and psychological harm on the plaintiffs and the members of their class which the Supreme Court in the *Brown* case found a violation of their constitutional rights." 244 F. Supp. 971, 981.

The court noted that the suggested action as outlined by the experts (majority to minority transfer plan, pairing

of the schools, faculty integration) was a good start, "but it of and in itself cannot and will not be the full solution of the problem. Further study, planning, and action is and will be necessary." 244 F. Supp. 971, 982. The court of appeals affirmed and this Court denied the board's petition for certiorari. *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931 (May 29, 1967).

After appeal, the board prepared a plan which incorporated the recommendations of the experts, with major implementation scheduled for the school year 1968-69. They were admonished by the court that it was their duty to further investigate, study and take further action to further desegregate and integrate the total Oklahoma City public school system, as well as to improve their plan.

E. *The Case in 1969.*

On June 12, 1969, the board, in compliance with the court's charge, filed "A Plan for Desegregation and Integration of Oklahoma City Public Schools—1969-70." A hearing was held on the plan and after three days of testimony, arguments and briefs, the board's June plan was rejected by the court.[6]

The court specifically found that in two of the schools it had ordered paired in 1965 there was developing a racial identification of those schools as being Negro (pp. 5a-6a, *infra*). In order to correct this situation and prevent further "deterioration," the court required the board to devise

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[6] Remarks from the bench, July 29, 1969—"Now I don't say that the School Board and Superintendent are not acting in good faith, but that the Plan is not a good faith plan because it doesn't do anything but let the situation stand as it is." (Appendix 5a, *infra*.)

a new plan similar to the so-called Wheat Plan presented at the trial, and also to file a long-range desegregation plan by November 1, 1969 (p. 6a, *infra*). The board responded affirmatively and presented a plan which, in effect, enlarged the attendant boundaries of the paired schools (pp. 20a-21a, *infra*). The court approved the new plan and entered its order accordingly (p. 11a, *infra*).

The McWilliams family represents a class of white families affected by the changed school zones. Under the prior plan children in the Belle Isle area attended Taft Junior High (about 3.1 miles)[7] and Northwest-Classen Senior High (2.8 miles). The new plan now in effect zones them to attend Harding Junior High (3.4 miles) and Northeast High School (5.3 miles). In accord with state law, all pupils living more than 1½ miles from school are given free transportation.

The defendant intervenors, representing an all-white area affected by the boundary change, filed notice of appeal on August 1, 1969, and moved for a stay of the district court's ruling. The court of appeals promptly granted intervenors a hearing and on the same day issued an order vacating the decision of Judge Bohanon and remanding the case for consideration of the applicability of section 407 (a)(2) of the 1964 Civil Rights Act "and to fashion its order accordingly" (p. 23a, *infra*). On August 8, 1969, Judge Bohanon responded to the circuit court's order stating that "The trial court did study and carefully consider this statute" (p. 26a, *infra*) and on August 13, 1969, reentered his prior order approving the board's plan and requiring the presentation of a comprehensive system-wide plan of desegregation by November 1, 1969 (p. 35a, *infra*).

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[7] The distances given are estimated distances measured from Belle Isle school; see the map included in the record in this Court.

Again, on August 14, 1965, after Judge Bohanon denied their motion of a stay, defendant intervenors appealed to the court of appeals seeking to have the district court order stayed or for other appropriate relief. On August 27, 1969, the Court of Appeals for the Tenth Circuit vacated the August 13 order (p. 38a, *infra*).

On August 29, 1969, Mr. Justice Brennan, on application of petitioners, vacated the order of the court of appeals pending briefs from the defendant intervenors by September 2, 1969. On September 3, after filing of briefs by defendant intervenors, Mr. Justice Brennan continued his order in effect pending disposition of a petition for certiorari to be filed within fifteen days (p. 44a, *infra*).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with applicable decisions of this Court.

The case presents important questions relating to the timing of public school desegregation in accordance with this Court's decisions in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown* I), 349 U.S. 294 (1955) (*Brown* II). It has been in litigation since 1961. In July, 1969, the district court ordered that certain amendments to the school desegregation plan take effect at the start of the 1969-70 school term. The trial judge declined to stay this requirement pending an appeal taken by intervening white parents ruling that the Constitution "requires the immediate execution of the school board plan" (appendix *infra*, p. 36a). In an unusual proceeding, the court of appeals, while considering a motion for a stay pending appeal, entered an order which summarily vacated the district court requirement for an amendment to the desegregation plan during the 1969-70 school year. The

court of appeals order had the effect of postponing indefinitely implementation of changes of the dsegregation plan which were found to be necessary by a district judge who had been exercising continuing supervision and jurisdiction over the desegregation of the Oklahoma public school system since 1961.

As we indicate more fully below, the court of appeals opinion does not state that it found any error of fact or law in the proceedings below, or that the trial court had abused its discretion. Rather, the court of appeals opinion was, in essence, a decision on the proper timing for desegregation. We believe that the court of appeals applied an erroneous standard in judging the timing question. The Tenth Circuit opinion stated the trial court had the power to see that the school system was desegregated only "with all reasonable dispatch." (Appendix p. 40a, *infra.*) In another case decided the same day the Tenth Circuit said that constitutional principles demanded only "that desegregation be accomplished with all convenient speed" *School District No. 1, Denver, Colo., et al.* v. *Wilfred Keyes, et al.*, 10th Cir. No. 432-69 (August 27, 1969).

In 1955, this Court directed the making of a "prompt and reasonable start" toward full desegregation and required that it be carried out with "all deliberate speed." *Brown* v. *Board of Education*, 349 U.S. 294 (1955). More recently, the Court has stated that "the time for mere 'deliberate speed' has run out." *Griffin* v. *County School Board*, 377 U.S. 218, 234.[8] The Court has held that "the burden on a school board today is to come forward with a plan that promises realistically to work, and promises

[8] See also, *Watson* v. *City of Memphis*, 373 U.S. 526, 529 (1963); *Goss* v. *Board of Education*, 373 U.S. 683, 689 (1963); *Bradley* v. *School Board*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Calhoun* v. *Lattimer*, 377 U.S. 263 (1964).

realistically to work *now*." *Green* v. *County School Board*, 391 U.S. 430, 439.

The action of the court of appeals in delaying a portion of the Oklahoma City desegregation plan for another year cannot pass muster by any of the standards enunciated by this Court since *Brown*. None of the reasons mentioned by the court of appeals for delaying desegregation are supportable under this Court's decisions. The basic reasoning of the court below was that it preferred to decide the legal issues presented at a later time in the context of the comprehensive plan for desegregation which the trial court had ordered the school board to present by November 1, 1969, "so that the whole matter, with all its legal implications, may be considered by this Court in one case." The court of appeals said that it was balancing the interests of those who sought desegregation against the interests of "those who now assert the constitutional right not to be transported to another school solely by reason of their race and to achieve racial balance in the community." In other words, the court of appeals ruling was based on a balancing of equities between those who seek vindication of their rights under the *Brown* decision and the intervening white parents who opposed the desegregation arrangements which changed the school attendance areas for their neighborhood.

The McWilliams intervenors presented no substantial legal question which would justify the delay of the desegregation plan. The essence of their objection and argument is:

> 1. that the dsegregation plan by enlarging the attendance areas for the Harding and Northeast schools to include their neighborhood requires their children to be transported by bus to attend different schools than those previously serving them;

2. that this action was taken because of race to send white pupils to the Harding and Northeast schools and thus achieve a racial balance at those schools;

3. that this action by the school board violates their constitutional rights under the Fourteenth Amenment; and

4. that this action is in conflict with section 407(a)(2) of the Civil Rights Act of 1964 (42 U.S.C. §2000c-b).

The district judge wrote an opinion dated August 8, 1969 (appendix p. 25a, *infra*), about the claim of violation of the Civil Rights Act, in response to a prior remand from the court of appeals asking that the district judge consider this question. The trial judge ruled that section 407(a)(2) was inapplicable to the situation in this case. In its most recent opinion, the court of appeals acknowledged that this view of the trial court "may well be right." (Appendix p. 41a, *infra*.) If that is so, the statutory issue certainly is not substantial enough to justify the delay.

The statutory argument of the intervenors involving section 407(a)(2) has been considered and uniformly rejected by the Courts of Appeals for the Fifth and Seventh Circuits and by district judges in Louisiana and Colorado. *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 880 (5th Cir. 1966), *affirmed on rehearing en banc*, 380 F.2d 385 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967); *United States* v. *School District 151 of Cook County, Ill.*, 404 F.2d 1125, 1130 (7th Cir. 1968); *Moore* v. *Tangipahoa Parish School Board* (E.D. La., C.A. No. 15556, July 2, 1969); *Keyes* v. *School District No. 1, Denver, Colo.* (D. Colo., Civ. No. C-1499, August

17, 1969). The proviso in section 407(a)(2) says that "nothing herein shall empower any . . . court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils . . ., or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." All of these courts which have considered the matter have concluded—as the plain language indicates—that nothing in section 407(a)(2) limits or decreases the power of the courts to grant equitable relief to remedy unconstitutional racial segregation.[9] The legislative history also shows the proviso was intended to be neutral on the constitutional issues about achieving so-called racial balance in the schools and that the solution should be worked out by local officials and the courts. Espousing this view, the floor manager of the bill, Senator Humphrey said that obviously this provision could not affect the courts' determination concerning racial imbalance and possible corrective measures because this would depend upon the courts' interpretation of the Fourteenth Amendment.[10]

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[9] For example, Judge Doyle in *Keyes* v. *School District No. 1, supra*, stated that:

> "The language of the proviso indicates that its purpose was to prevent the implication that Section 407(a) enlarged the powers of the federal courts. The proviso states that the Section grants a court no power to order transportation to achieve racial balance, nor does the Section 'otherwise enlarge the existing power of the court to insure compliance with constitutional standards.' The equitable powers of the courts in directing compliance with constitutional mandates exist independent of the 1964 Civil Rights Act. *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 880 (7th Cir. 1966). The proviso merely explains that Section 407(a) is not to be construed to enlarge the powers of the courts; it does not limit those powers."

[10] 88 Cong. Rec. 13820-21 (1964), remarks by Senator Humphrey:

> "In some instances courts have decided that racial imbalances may constitute a denial of equal protection of the laws. *Balaban* v. *Rubin*, 32 U.S.L.W. 2465; *Blocker* v. *Board of Education*, 32 U.S.L.W. 2465; *Jackson* v. *Pasadena School*

The McWilliams intervenors' constitutional arguments are equally insubstantial. Their argument rests on the theory that they, as white students whose attendance areas were changed, are being transported from one school to another because of their race, and thus in violation of their constitutional right. This argument has no merit because obviously every corrective measure designed to disestablish the formerly segregated system and convert the system into a nonracial system is in some sense predicated on race. School systems could not be desegregated if school boards were forbidden to consider race in making pupil assignments. There is no constitutional right to be segregated. White students and parents have no constitutional right to demand that desegregation plans leave their school assignments unchanged and that Negro pupils be the only ones

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Board, 382 F.2d 878. On the other hand, relief has been denied on the grounds that school racial imbalance resulting from de facto segregation is not per se unconstitutional. *Bell v. City of Gary*, 324 F.2d 309, certiorari denied, 32 U.S.L.W. 3384. Some communities are attempting to correct racial imbalances by the transporting of children; others refuse to do so. *The purpose of the pending Dirksen-Mansfield-Humphrey-Kuchel substitute is to make clear that the resolution of these problems is to be left where it is now, namely, in the hands of local school officials and the courts. This bill is made neutral on the resolution of these problems* by the language of title IV. It is to be used as the vehicle to require transportation to correct racial imbalances; it is not to be used as an excuse for local officials to refuse to carry out their obligations. Obviously this provision could not affect a court's determination concerning racial imbalance and possible corrective measures; *this is dependent upon the court's interpretation of the 14th amendment.*

As floor manager of this legislation, I wish to note the intention of those who sought to deal with the vexing problem of de facto segregation through the language contained in Dirksen substitute amendment." (Emphasis added.)

See also the remark by Senator Saltonstall stating that "the whole purpose of the substitute amendment is to see that the courts will not be given, by this law, any more power on the question of busing and the question of racial imbalance, than they have at the present time." 88 Cong. Rec. 13821 (1964).

shifted to new schools. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of the equal protection of the laws to other individuals."[11] The school board and the district court plainly have not only the power but the duty to design a desegregation plan that rearranges school attendance zones, so as to proceed in "the dismantling of well-entrenched dual systems." *Green* v. *County School Board*, 391 U.S. 430, 437 (1968). The board is "charged with the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." (*Id.* at 437-438; emphasis added).

"To use the Fourteenth Amendment as a sword against such State power would stultify that amendment." *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98 (Mr. Justice Frankfurter concurring). Similar arguments have been rejected by another panel of the court of appeals in this Oklahoma City case as well as by the Fourth Circuit. See *Board of Education of the Oklahoma City Public Schools* v. *Dowell*, 375 F.2d 158, 169-70 (10th Cir. 1967) (Judge Lewis concurring); *Wanner* v. *County School Board of Arlington County, Va.*, 357 F.2d 452, 454 (4th Cir. 1956).

The court below did not indicate that it thought the trial judge had erred in rejecting the intervenors' constitutional claim. The appellate opinion indicated that the trial court:

> [M]ay also be correct in the apparent belief that the traditional neighborhood concept must yield to the overriding power of the court to fashion an adequate remedy for desegregation and integration of the Okla-

[11] *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

> homa City schools. Nothing we shall say or do here is intended to repudiate or derogate from the court's power to fully integrate the Oklahoma City School system. But the remedy is drastic and has been applied sparingly and reluctantly. Surely no one will say that it is not fraught with constitutional complexities. In any event, this panel of the court is divided and in doubt. (Appendix p. 41a.)

Petitioners submit that the trial judge's action in enlarging attendance areas for the two schools presents no serious constitutional questions. Judge Bohanon's order that the school zones be changed did not in terms require that pupils be transported. Under local law pupils are furnished transportation when they must travel more than a mile and a half to school. The McWilliams class is entitled to free bus rides under either the old or the new zones. The real difference is that Judge Bohanon's order requires them to go to schools that were roughly half Negro and half white.[12]

The obligation of the district court in examining the board's geographic zone plan was to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459-460 (1968), quoting from *Green* v. *County School Board*, 391 U.S. 430, 442 (1968). This pragmatic approach of the *Green* and *Monroe* cases, *supra*, was applied by the trial judge after a three day hearing involving expert testimony and proposals. The court ordered a simple zoning change, advocated by the experts, and the details of which were devised by the school officials themselves. This judgment cannot be upset based on appeals to abstractions like a

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[12] The school board's stated objective was that Harding and Northeast be about 70% white and 30% Negro (p. 19a, *infra*).

"neighborhood school concept," where the trial judge has simply devised a reasonable change of school zone lines to disestablish segregation. Nor does it matter that the zones now being changed were designed earlier as part of an approved desegregation plan. As this Court noted in *Monroe, supra* at 459, it will condemn any system that "operates as a device to allow resegregation of the races." ". . . [G]eographic zoning, like any other attendance plan . . . is acceptable only if it tends to disestablish rather than reinforce the dual system of segregated schools." *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086, 1093 (5th Cir. 1969); *Davis* v. *Board of School Commissioners of Mobile County*, 393 F.2d 690, 694 (5th Cir. 1968); *Henry* v. *Clarksdale Municipal Separate School District*, 409 F.2d 682 (5th Cir. 1969).

This Court has affirmed the equitable powers of the district court to fashion remedies sufficient to eliminate the discriminatory effects of the past. *Green* v. *County School Board*, 391 U.S. 430, 438 (1968); cf. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

2. The case presents a federal question of obvious national importance.

This case involves the proper standards to be applied in determining if the constitutional right of Negro students to a desegregated education may be postponed, or indeed, whether there may be any possible acceptable justification for postponement 15 years after *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The question of the proper standards to be used now, in 1969, in determining when school districts must desegregate to comply with their constitutional obligations is an issue which is constantly before the lower federal courts. It also presents a question which is constantly presented to the Executive Branch of the na-

tional government, particularly the Department of Health, Education, and Welfare, which has the responsibility under Title VI of the Civil Rights Act of 1964 to assure that federal funds are not used to support unconstitutional segregation. Mr. Justice Black has pointed out in a recent opinion as a Circuit Justice, in chambers, that:

> *Brown I* was decided 15 years ago, but in Mississippi as well as in some other States the decision has not been completely enforced, and there are many schools in those States which are still either "white" or "Negro" schools and many that are still *all*-white or *all*-Negro. This has resulted in large part from the fact that in *Brown II* the Court declared this unconstitutional denial of equal protection should be remedied not immediately, but only "with all deliberate speed." Federal courts have ever since struggled with the phrase "all deliberate speed." Unfortunately, this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated. "All deliberate speed" has turned out to be only a soft euphemism for delay. (*Alexander* v. *Holmes County Board of Education*, not yet reported; opinion of Mr. Justice Black in Chambers, September 5, 1969.)

Petitioners submit that upholding the decision below would inevitably lead to a slowdown in the substantial national progress toward compliance with the *Brown* decision which has begun since this Court's decision in *Green* v. *County School Board of New Kent County, Va.*, 391 U.S. 430 (1968). It is important to the continuation of that progress that this Court make it unmistakeably clear what standards control the timing of desegregation now that 15 years have passed since *Brown I*. We urge that the appro-

priate rule is the one stated by Mr. Justice Black in *Alexander* v. *Holmes County Board of Education, supra*, where he stated:

> It has been 15 years since we declared in the two *Brown* cases that a law which prevents a child from going to a public school because of his color violates the Equal Protection Clause. As this record conclusively shows, there are many places still in this country where the schools are either "white" or "Negro" and not just schools for all children as the Constitution requires. In my opinion there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute. I fear that this long denial of constitutional rights is due in large part to the phrase "with all deliberate speed." I would do away with that phrase completely.

In the fact of the resistance in some places to compliance with *Brown* which must be recognized as a fact of our national life such a rule would not instantly bring about nationwide compliance. But it would unequivocally deny legality to continued failure to complete desegregation. If it is not clear already that the *law* does not sanction any further delay in desegregation, then it is indispensable that this be made clear. Otherwise, the opponents of *Brown* will successfully erode the principle of the case by their decade-and-a-half tactic of delay, and more delay. No more judges or executive officials—from school board members to the Secretary of Health, Education, and Welfare, or the Attorney General of the United States—should be left with any doubt whatever that the time for desegregation is really *now* and not later after "problems"—which are always a concomitant of any dynamic educational system—are solved.

On September 12, 1969, the United States Commission on Civil Rights issued a unanimous statement[13] which shows quite clearly the crucial nature of the problem involved here:

> While progress has been slow, the motion has been forward and this is certainly no time to create the impression that we are turning back, but a time for pressing forward with vigor. This is certainly no time for giving aid and comfort, even unintentially, to the laggards while penalizing those who have made commendable efforts to follow the law, even while disagreeing with it. If anything, this is the time to say that time is running out on us as a nation.
>
> In a word, what we need most at this juncture of our history is a great positive statement regarding this central and crucial national problem, where once and for all our actions clearly would match the promises of our Constitution and Bill of Rights.

3. The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The court of appeals had before it a request for a stay pending appeal. The court acted expeditiously to consider the stay request, recognizing the imminence of the beginning of the school term. However, instead of granting a stay pending appeal, the court vacated the district court judgment entirely. By this action the court recognized that the disposition of that stay request, in effect, would determine the outcome of the litigation for the 1969-70 school year. However, since the court of appeals did not have a record of the proceedings in the court below, or briefs from the parties arguing the merits, its opinion did not

[13] The statement is reprinted in *New York Times*, September 13, 1969, p. 28 (Late City Edition).

state any conclusion on the merits of the constitutional arguments advanced by the intervening white parents who brought the appeal. Rather, as we have noted above, the court stated that the district judge's decision might well be correct on the statutory and constitutional issues presented. Thus, this litigation presents the anomalous result that the trial judge's decision was reversed even though the court of appeals acknowledged that it might well be correct.

It is submitted that this extraordinary action by the court is so unusual as to call for the exercise of this Court's supervisory powers. In the companion case involving the Denver, Colorado public schools, where the court of appeals granted only a stay pending appeal, Mr. Justice Brennan vacated the stay as "improvident" because the Tenth Circuit acknowledged that the district court's judgment "may be correct." *Keyes v. School District No. 1, Denver, Colo.*, not yet reported (Mr. Justice Brennan as Acting Circuit Justice, August 29, 1969). If, as we believe, Mr. Brennan was correct, in ruling that a stay was improvident in such circumstances, it seems *a fortiori* correct that summary reversal of the district court would be improvident in the same circumstances.

Judge Bohanon concluded, against a background of patient consideration over nearly eight years of litigation and after hearing testimony for three days, briefs and argument, that the amended desegregation plan for the Oklahoma City public schools should be implemented forthwith at the start of the 1969-70 school term. Fortunately, that direction has been carried out due to the order of Mr. Justice Brennan reinstating the district court order. The court of appeals order vacating Judge Bohanon's order without any assertion that his decision was in error is plainly insupportable. The order of the district court

carried with it a presumption of validity which the court of appeals has not questioned. In that situation, the judgment of the court of appeals was plainly contrary to the usual course of judicial proceedings and merits review here.

4. A judge of the panel below was disqualified under the provisions of 28 U.S.C. § 47 because he had previously heard and decided issues involved in the cause as a member of a statutory three-judge district court.

It is respectfully submitted that the presiding judge of the court below, Chief Judge A. P. Murrah of the United States Court of Appeals for the Tenth Circuit was disqualified to participate in the decision below by 28 U.S.C. §47 which provides that "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." This Court has said that where a court is organized in violation of this statute "... it plainly results that an error of so grave a character, and involving considerations of public importance, was committed, as to cause it to be our duty to allow the writ of certiorari ..." (*William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co.*, 228 U.S. 645, 650 (1913)).

This action was commenced in October 1961 and was initially heard by a three-judge court composed of Circuit Judge Murrah and District Judges Bohanon and Daugherty. "On the 3rd day of April, 1962, the three-Judge Court, duly assembled, did hear testimony and evidence concerning this action. Thereafter, and on the 10th day of July, 1962, the Court entered its order dissolving the three-Judge Court[.] ..."[14] The matters heard and decided by

[14] The three-judge proceedings are described in this manner in a subsequent opinion by Judge Bohanon. *Dowell v. School Board of Oklahoma City Public Schools*, 219 F. Supp. 427, 429 (W.D. Okla. 1962).

the three-judge court are indicated by a pre-trial order of January 26, 1962 (Appendix *infra* p. 49a) and by the order of the three-judge court (Appendix *infra* p. 45a). In that proceeding the matter went to trial on plaintiffs' contention that the defendants "continued to operate and are now operating segregated schools" and the claim that a state law authorizing the board to "designate the schools to be attended by the children of the district" was unconstitutional as applied (Appendix *infra* p. 57a). The cause went to trial on the school board's contention that the issue was "whether or not the defendants have adopted a plan which is a good faith attempt to comply with the said decisions on desegregation as rapidly as possible, all things being considered" and their "contention . . . that the plan adopted by the Defendant District is such reasonable plan which entitles it to be approved by this Court . . ." (Appendix *infra* p. 59a). The order of the three-judge court noted these contentions of the parties (Appendix *infra* p. 45a), concluded that the "plaintiffs' evidence failed to show that the above mentioned statute is or was unconstitutionally applied by the defendants" (see *infra* p. 47a), ruled that there were no further questions for the three-judge court and reassigned the matter to Judge Bohanon for further proceedings (*infra* p. 47a).[15]

It is quite plain under this Court's decisions that Judge Murrah's participation in hearing and directing that the school board's pupil assignment policies were a sufficient desegregation plan disqualifies him from hearing such an

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[15] The action of the three-judge court directly affected the timing of desegregation in Oklahoma City. The trial on the merits before the three judges was held April 3, 1962. Its opinion denying plaintiff's relief and referring the matter to a single judge was issued July 10, 1962. Thus, when plaintiffs finally obtained an order for desegregation from a single judge a year later in July 1963, the desegregation order did not take effect until another school year had passed.

issue on a later appeal. A judge who has once heard the cause on its merits in the trial court is disqualified from hearing an appeal "in the same cause, which *involves in any degree* matter upon which he had occasion to pass in the lower court." (Emphasis added.) *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899); *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U.S. 339 (1913); *Wm. Cramp & Sons S. & E. B. Co.* v. *International Curtis Marine Turbine Co.*, 228 U.S. 645 (1913); *American Construction Co.*, v. *Jacksonville T. & K. W. Railway Co.*, 148 U.S. 372, 387 (1893); *cf. United States* v. *Emholt*, 105 U.S. 414 (1882). Admittedly, the school board's particular practices which were before the district court in 1969 are not the same as those before the three-judge court in 1962. Conditions have changed during and because of the litigation. But the basic issues are still the same as they were then, including whether the board is really complying with its duty under *Brown*, how fast desegregation must proceed, whether the schools have been fully desegregated or more must be done, whether the board has affirmative obligations to change the segregated patterns. At any rate, the test employed by this Court in construing section 47 is a strict one. Section 47 is "not restricted to the case of a judge's sitting on a direct appeal from his own decree, or upon a single question" (*Moran, supra*, 174 U.S. at 157). "A judge who has sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the circuit court of appeals at the hearing of the whole cause at the same or at any later stage" (*ibid.*).

Judge Murrah's disqualification under section 47 is not affected by the fact that petitioners below made no objection to his participation in the consideration of the motion for a stay in the court below. The matter of disqualification was not raised or discussed by anyone below. This was perfectly understandable in the circumstances

of the case.[16] But under this Court's unanimous and long-standing decisions failure to object to this statutory disqualification does not make a difference, for even the parties' "consent to the judge's participation in its decision can make no difference." *Rexford* v. *Brunswick-Balke-Collender Co., supra*, 228 U.S. at 344; *Wm. Cramp & Sons S. & E. B. Co.* v. *International Curtis Marine Turbine Co., supra*, 228 U.S. at 650.

The rule expressed in section 47 is quite strict. The Court has called it "comprehensive and inflexible" (*Wm. Cramp & Sons, etc., supra*, 228 U.S. at 650). Indeed, the Court has thought such disqualifications so important that it has said that a disqualified judge's participation means that the "court of appeals which passed upon the case was virtually no court at all, because not organized in conformity to law" (*id.* at 228 U.S. 652). As Mr. Justice Black wrote for the Court in a different, but related context in *Re Murchison*, 349 U.S. 133, 136:

> "'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11.

[16] None of petitioners' present attorneys participated in the three judge court hearing in 1962. Petitioners' attorney at that time, John Green, Esq. of Oklahoma City, subsequently became an Assistant United States Attorney. (See 219 F. Supp. at 428.) The hearing before the court below, in which Judge Murrah participated was conducted as an emergency matter on short notice. The similarity of the issues involved now and those involved at the 1962 hearing before Judge Murrah only came to the notice of petitioners' counsel during the preparation of this petition. It should be noted that Judge Murrah also participated in court of appeals' orders entered in this case on July 21, 1969, and on August 5, 1969.

Section 47 descends from a similar prohibition enacted by the Congress in the judiciary act of 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 548). "The intention of Congress . . . manifestly was to require that court to be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of the first instance." *Moran* v. *Dillingham*, 174 U.S. 153, 156-157 (1899). Judge Murrah expressed a view in the July 10, 1962, order that the school board had not engaged in racially discriminatory assignments of pupils. He should not have participated in an appeal involving that same question.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted and that the judgment of the court of appeals should be reversed and the order of the district court reinstated.

We urge that the Court do more than simply quash the judgment of the court of appeals and remand for further proceedings before a properly constituted court as was done in *Moran* v. *Dillingham*, 174 U.S. 153, 158 (1899), and *Wm. Cramp & Sons S. & E. B. Co.* v. *International Curtis Marine Turbine Co.*, 228 U.S. 645, 650-652 (1913). The equities require that the district court's order of August 13, 1969, be kept in effect and that the status quo, as it exists under Mr. Justice Brennan's stay injunction, be preserved. Equity also requires that the case be disposed of with the least possible delay. *Turner* v. *Memphis*, 369 U.S. 350, 353-354 (1962), suggests an appropriate disposition to avoid such delay. Here, as in *Turner*, there is "no reason why disposition of the case should await decision by the Court of Appeals." *Turner*, *supra*, 369 U.S. at 353. To

expedite the litigation, this petition may be treated as one prior to judgment in the court of appeals (28 U.S.C. §1254 (1)) and the case remanded to the district court to carry out the further steps contemplated by the August 13, 1969, order. Here, as in *Turner*, *supra* at 354, the litigation should be "disposed of as expeditiously as is consistent with proper judicial administration."

Respectfully submitted,

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APPENDIX

Oral Opinion of District Court dated July 29, 1969

(Title Omitted)

PROCEEDINGS

July 29, 1969

The Court: Well, has everyone said what they wanted to say on this subject matter and on this problem?

First, I would like to say that I do appreciate the work, the hard work and skillful work, that has been put into the problem before the Court by attorneys on both sides. The Court knows, as has been said, that the feeling in these matters becomes very high, very tense and very positive in different people.

To some, it gets to where it's almost such a feeling of life and death; but really, it's just another lawsuit, so far as the Court is concerned.

But I do appreciate the briefs, I do appreciate the suggested findings of fact. They are helpful. They are very helpful to me, just like your arguments have been helpful; but when you put your findings of fact in writing and read it, you then can analyze it in the quietness of your library.

Then I should like to say to the School Board that I have heard the School Board members, each one and all, testify in this case, and I am impressed with the sincerity and with the dedication to duty and your desire to perform your duty for the benefit of the school children, for the benefit of this city, this state and this nation.

I know you have worked hard. You are men experienced in business, and some of you have some knowledge now of exactly what the law is in these matters. You have known generally what the facts were for a long time; but the Court feels that this School Board is as good as any other school

board in the matter of the average run of school boards and their work and their visions of their duty.

Now that brings the Court to the matter of the court itself. The Court has been with this case since it was filed, and it was filed and fell on my docket by lot. At that time the case was challenging the constitution of various sections of the Oklahoma statutes, saying they are unconstitutional and that the School Board was using these unconstitutional statutes to perform an unconstitutional duty. That's where the case started out.

From a three Judge court it simmered down to a one Judge court and then the Court began to hear some evidence.

Shortly an order was made which the Board then complied with. It was so positive that they should comply with the earliest and first order; and then the question came for a long range program.

The Court got no cooperation from the then School Board, and the Court ordered, as you all know, an independent investigation and a plan submitted, which was submitted.

The Court considered the plan, heard evidence on it, and adopted it.

Now that plan was appealed. That was in '65, I believe, July or September. Two long years passed before that case was returned to this Court, and three years before it actually got into operation by the School Board. It was affirmed by the Circuit Court of Appeals and was affirmed in effect by denial of a writ of certiorari by the Supreme Court.

Now it goes without saying that when the Supreme Court hands down an opinion, that is the law of the case, that is the law of the land.

Circuit Courts write opinions and Circuit Courts disagree, and when disagreed Circuit Courts get to the Su

preme Court, the Supreme Court then decides which of the Circuit Courts is right and then that becomes the law of the land.

I was amazed at Mr. Short's brief, which is a very fine brief, Mr. Smith's and Mr. Johnson's. Mr. Johnson's brief doesn't cite a single Supreme Court decision, not one. Mr. Short refers to the Green, the Rainey and the Monroe, but you take a different view from what the court says.

Other than those reviews or references to the Supreme Court, yours are all Circuit Court opinions.

Now this Court is bound and the School Board is bound and the duty by law is upon the School Board, not on this Court, to form a plan that is effective and will do the work that is required of, expected, and the law requires.

Now in the Dowell case, which is our case and which is the law on this School Board, in that case this Court ordered change of attendance school boundaries. That's your "pair."

That was affirmed by the Circuit, that was affirmed by the Supreme Court, and that is the law we are "saddled" with or "married" to, or controls us; and when the intervenors here for the defendants say that it's unconstitutional, I say that that has been put to rest in the Dowell case. In this case it is the law of this case, and change of boundary lines was there approved.

There had to a change of boundary lines, or else Harding would not have received students from other districts. Northwest would not have received students from other districts, and the same thing applies to Central and Classen.

So there is no question but what under all the law, this Court has no alternative, no other duty, looks for no other alternative and will follow no other duty than to enforce the law as I know it to be.

Oral Opinion of District Court dated July 29, 1969

It's not whether I like it or not, whether I would have written the law as they did or not; but in the 1965 opinion and order of this Court, I only followed the Brown cases and other Supreme Court cases. It wasn't my law, but it was the law of our country. It was the law of our nation.

As I have said, the responsibility to formulate the plan is upon this School Board now and always. This Court has no right to try to run the School Board and is not going to undertake it, but this Court does have a right and a duty to see that you do, if you do not. That's the law.

It kind of reminds me of when we are here trying law suits with jurors in the box and we have a jury. The jury goes out, they come back and say, "Well, we've got a hung jury, Judge. We can't agree on anything. We want to be excused."

The Court says, as we have since the old Allen rule that goes back to 1890 when the Judge said, "Well, you haven't worked long enough. You haven't worked hard enough. You haven't tried hard enough to get together and decide this case."

So long as the Court doesn't tell the jury exactly what to do, the rule is all right. The jury goes out and they work some more and finally they bring in a verdict.

In that case, the Supreme Court said, in the Allen case, that for the Court to do some prodding is all right, just so the Court doesn't order or dictate what the jury should do. They must be free agents to do what they think should be done.

That's hardly the case here. The duty is upon the School Board to return or to prepare and follow a plan of desegregation. I can't tell you what the plan is. I can't tell you what it should be. I don't know.

But it's your authority, as you know if you don't want to hire authorities, you've got a wonderful staff out there, you've got wonderful help down at Norman to help you out, you've got a wonderful opportunity to go to Health, Education and Welfare.

I am told that the Health, Education and Welfare will not disturb or bother or interfere with any case that's in court unless the Board asks them to come in and help, and then of course they will come. There's a story in the paper today where Health, Education and Welfare stepped in down in Louisiana and they are helping the School Board on a plan. That could be a great help to you. You are at liberty to get help wherever you want to.

Well now, then, the Court comes down to what the Court is going to do, what the Court says.

I have to say to this group of the Board members that the May 30, 1969 Plan is not a plan in good faith.

Now I don't say that the School Board and Superintendent are not acting in good faith, but that the Plan is not a good faith plan because it doesn't do anything but let the situation stand as it is.

(Addressing Mr. Estes, a member of the School Board) Wait until I get through, Mr. Estes.

Now then, you have a situation that is unwholesome: Harding and Northeast.

It's not this Court's fault because when this Plan was made in 1965, the order was made in '65, if the School Board had taken the order and put it into effect that year, your ratio would have been pretty close, we don't know what it was, but it would have been pretty close to 90-10; but three years later you had, as has been argued and the evidence shows and you all know, you had white flight to the point

have been; and if you permit this situation to continue, it will further continue to deteriorate.

I am convinced of that and I so hold and find.

The Court finds and holds that the Wheat Plan, temporary as it is, partial as it is, has good merit and it is worthy of your consideration.

The Court holds and finds that this School Board must, within a period between now and October 30th, prepare and submit to the people a long range integration desegregation plan.

The Court holds and finds that thereafter the plan will be heard and it will be determined what to be done about it.

Now the Court is reluctant now, always has been and always will be, to order this governing body who represents some 75,000 young children, who spend some 23-25 million dollars — I am going to ask you; as I talked to you about in the Allen instruction, I am going to ask you if you don't think that you could go to your quarters wherever they are, today, tomorrow or next day, talk this over without the interference of any lawyer, without the interference of the patrons? If necessary, I'll order that the patrons stay away and the lawyers stay away.

See if you can't bring in or authorize a plan that will put the Wheat Plan into operation, '69-70 school year; and those other things, whatever they might be.

If you did that, the Court would gladly approve it and then we could be on our way.

Today is Tuesday. Let me ask you, do any of the School Board members have any objection, now that you have heard all this evidence, you have heard all the law, do you have any objection to going into your offices, wherever they are, reconsidering and seeing if you can't come out with something in the neighborhood of the Wheat Plan?

Oral Opinion of District Court dated July 29, 1965

What do you say, Dr. Hill?

Dr. Virgil Hill: Your Honor, I called a meeting for 7:30 this evening. We plan to spend as much time as necessary. We would appreciate lack of interference from the public. This does retard our effort and introduces an emotional element perhaps we don't need.

We certainly have made provisions to get together as quickly as possible to discuss your remarks, the evidence we have heard here, what we hope we can come up with.

The Court: How do you feel about it, Mr. Rogers?

Mr. Rogers: I think that's the thing we should do, get together immediately.

The Court: How do you feel, Mr. Lott? You may keep your seat.

Mr. Lott: I am ready to get ahead.

The Court: Mr. Estes, how do you feel? Do you feel like you can work together?

Mr. Estes: Well, I have for eight years, your Honor, tried to satisfy the taxpayers and to provide an education for the boys and girls regardless of race, sir, and I will, as long as I am a member of the Oklahoma City Board of Education, I will continue to do so, sir; and I will certainly cooperate and try to come up with a plan.

I thought we had come up with a reasonable plan, sir. I thought we had come up with a plan that would work if we could get cooperation, sir. I don't know what we can do. There have been many people who have criticized us in what we are trying to do, but no one has ever come up with a plan that will work.

We don't know, sir, that this plan won't work. It hasn't been decided. I will continue to do what I can with respect to the court and respect to my duty as an elected official of the Board of Education.

Oral Opinion of District Court dated July 29, 1969

The Court: Thank you, Mr. Estes.

Let me say this to you as a thought of the Court. In your eighteen point program which I have read and re-read, and very carefully read, there are very laudable ideas, thoughts and policies.

You ask for the aid of the Chamber of Commerce, the aid of the churches, the aid of the City Council and the Legislature. Did it ever occur to you that I as a citizen, the Chamber of Commerce or anybody — we can't help you until we know what you want done. You've got to lead off, first foot forward with a plan; and you are going to find that a lot of people don't like it.

A lot of people don't like what I do, and I've done it; but my duty and your duty are alike. If they don't like it, so far as you are concerned, they will just not reelect you. So far as I am concerned, I don't know what it's going to do.

But here's the point: the law is upon this School Board to desegregate these schools. It's not on the Court. You can't put that on the Court. I'm not going to let you do it. That's your responsibility.

But the Court will approve anything you put in that is reasonable and workable and in good faith.

Well, I've probably talked too much. What do you have to say, Mr. Yinger? Do you think this is a good suggestion on the part of the Court?

Mr. Yinger: Yes, sir. We are putting a burden on our staff if we delay any further to September. I think that it's necessary that we, if we can't come up with something this evening, I don't think we have many alternatives, that then I would say that any further delay would be sufficient that our staff and Dr. Lillard, it would be very difficult to implement that plan.

Oral Opinion of District Court dated July 29, 1969

Your Honor, I would like to make one further statement. Dr. Lillard has taken much criticism, there has been much criticism leveled at him for his failure to lead this Board; and I might say that it has dawned on me as a member of this Board that we are the policy making branch of this system and he is our administrative officer, and I feel that this Board should in no way try in any way to bring Dr. Lillard into anything that is before this Court; and I would like to say that he follows what we say to do.

The Court: Well, you are so true. Lillard, he's your "hired help," but he is, under the general working of things, expected to lead your, lead you into a plan and augment and carry out the plan.

All right; now then, here is what I'd like to say.

You meet tonight. I don't want to rush you. I am not going to rush you as long as it isn't necessary. But you meet tonight and I'll ask Mr. Johnson to file with the Clerk on Thursday what the plan might be.

If it is satisfactory, you can expect this Court to approve it, if it reasonably complies with the Wheat Plan with reference to—I am now talking only about Harding and Northeast because Classen and Central are out of it at this time.

You file that, and without further evidence, without further argument of anyone, the Court will either approve or disaffirm if it's not a proper thing, if it isn't workable and doesn't get at the problem of desegregating and integrating these schools as the Supreme Court has said that it shall be.

Then the Court will then have to, of course, shoulder up to the Court's responsibility of doing what the authorities, the Supreme Court has said this Court shall and must do.

Does anyone have anything further to say?

Oral Opinion of District Court dated July 29, 1969

Mr. Walker: Your Honor, we have one additional item to present to the Court which has been presented in our proposed findings of fact, and that is this:

We respectfully pray that the complaint of the defendants be dismissed, the defendant intervenors dismissed. They merely stand before the Court as citizens of the community who have children who attend the schools, who do not want their children to be in racially balanced schools.

The Court: Let me say this to you, Mr. Walker. That come tomorrow or day after tomorrow—tomorrow is Wednesday, Thursday—come Thursday, if for any reason the Court has got to make any kind of order, the Court will take your motion into consideration; that is, any kind of order with reference to desegregation and integration, but right now the Court is interested in seeing if the School Board will not get on the road to integrate and desegregate these schools, and then prepare a final plan within the time heretofore allotted.

Mr. Walker: Thank you, your Honor.

Mr. Thweatt: May it please the Court, may I be heard just one second?

Your Honor has used the analogy of a Judge instructing a jury as being analogous to saying, "Gentlemen, go back and consider the problem further."

I think the School Board doesn't really appreciate what the problem is. I would ask your Honor to instruct them definitely what the Court means by "desegregation," what the Court means by "integrate." Are they the same term, or are they different terms?

The Court: Well, the Court is not going to bother to answer you.

Will you recess court, please.

(The proceedings are adjourned.)

Order and Decree of District Court dated August 1, 1969

[Title Omitted]

The Defendant Board having filed its plan and supplement thereto for the further desegregation and integration of the Oklahoma City Public School System, said plan and supplement thereto, Exhibit 1 May 30, 1969 plan, and Exhibit 2 filed August 1, 1969, each attached to this Order and Decree and made a part hereof, the Court having carefully considered and examined the same, the Court is of the opinion said two plans, treated as one, should in all things be approved.

It is, therefore, ordered, adjudged and decreed as follows:

1. The plan and supplemental plan, Exhibits 1 and 2 treated as one plan attached hereto for further desegregating and integrating the public school system of Oklahoma City as submitted by the Board of Education of the Oklahoma City Public Schools, defendant, be and the same are hereby approved; and it is ordered and decreed that said plans, treated as one, be put into force and effect for the school year 1969-1970.

2. It is further decreed by the Court that the defendant Board of Education of the Oklahoma City Public Schools prepare and file with the Clerk of this Court on or before November 1, 1969, a full comprehensive plan for the complete desegregation and integration of the Oklahoma City Public School System as to students, faculty and employees of all grades employed by the Oklahoma City School District.

Order and Decree of District Court dated August 1, 1969

The request in attorney's Motion relating to members
r Estes and William Lott has been carefully con
ed and denied.

is Court retains jurisdiction to assure compliance with
Decree, or until the further Order of the Court.

ted this 1st day of August, 1969.

/s/ Lawrence Bonassos
United States District Judge

Exhibit 1 Attached to Order and Decree

(Report of Defendants of Plan for Further Desegregation and Integration of the Oklahoma City School System in the 1969-70 School Year)

[Title Omitted]

The Defendants hereby report to the Court and ask to be heard thereon their Plan for further desegregation and integration of the Oklahoma City School System in the 1969-70 school year, which Plan is attached hereto as Exhibit A hereof.

J. Harry Johnson
2105 First National Building
Oklahoma City, Oklahoma 73102
Attorneys for Defendants

June, 1969

Exhibit 1 Attached to Order and Decree (Cont'd)

(A Plan for Desegregation and Integration of Oklahoma City Public Schools—1969-70 Adopted as a Policy, Friday, May 30, 1969)

The Oklahoma City Board of Education recognizes its responsibility to prepare students to live in a technological and pluralistic society.

The Oklahoma City Board of Education reaffirms its commitment to desegregate and integrate the total Oklahoma City Public School System.

The efforts of the past years provide a firm basis on which to build and take additional positive steps. The overall climate among patrons and students is conducive toward further progress.

A goal of the Oklahoma City Board of Education is to provide an early, effective integration experience for an increasing number of students.

This school system is an island providing integrated student bodies and staffs among otherwise nonintegrated school districts. This makes the taks of the Oklahoma City schools more difficult.

The interim report of the Committee on Equality of Educational Opportunity, with numerous suggestions by groups and individuals, received careful consideration by the Oklahoma City Board of Education. Appreciation is expressed to all for their efforts on behalf of the school district.

No one plan, or a series of plans, is a final solution to this most complex problem. Continued study is a necessity. The total community must be involved including the state, county, city, civic organizations, Chambers of Commerce, churches and other groups and individuals. The task is not the sole responsibility of the school system.

Exhibit 1 Attached to Order and Decree (Cont'd)

Plans considered by the Oklahoma City Board of Education must be educationally sound and economically feasible. The purpose is to provide equality of educational opportunity and a quality educational program for all pupils.

No one announcement can include all details. Additional details will emerge later.

Steps to be taken by the Oklahoma City Board of Education are:

(1) Maintaining order and discipline as necessary ingredients for a quality education.

(2) The strict enforcement of regular attendance of all students.

(3) The strict enforcement of the policy of the attendance of students according to their legal residence.

(4) The establishment of a school for students requiring special programs and services other than special education. Disruptive students not benefiting by attendance at a regular school will be assigned to this school.

(5) Support of open-housing ordinances which will permit integration to occur at a neighborhood level.

(6) Continued efforts to prevent the concentration of multiple housing units which would concentrate large numbers of the minority race in the Northeast section of Oklahoma City.

(7) Request a policy statement form the Oklohama Education Association, and the Oklahoma City Classroom Teachers Association concerning their commitment and involvement in the desegregation and integration of the schools.

Exhibit 1 Attached to Order and Decree (Cont'd)

(8) Sponsor legislation providing for a seven-member Board of Education. Board members would represent seven rather than four geographical areas of the school district. The at-large position would be abolished. Terms would be five years in length. Election of members would be at large. The intent would be to provide for greater community participation on the Oklahoma City Board of Education and representation of the minority races.

(9) Request of the Oklahoma State Legislative Council that consideration be given to rewriting the State School Laws which relate to the transfer of pupils.

(10) Request the Oklahoma County Superintendent of Schools to cease granting legal transfers from the Oklahoma City Public Schools.

(11) Communicate regularly with the superintendents of neighboring school districts asking they not accept legal transfers or tuition pupils from the Oklahoma City Public Schools.

(12) Request the Oklahoma County Medical Society to ask their members to be extremely judicious in issuing school transfer medical certificates.

(13) Work with institutions of higher learning in the development of teacher education programs which will prepare more effective teachers.

a. Teacher corps programs to prepare students to teach in the inner city area. Seven team leaders and thirty-five interns to be assigned to Capitol Hill Junior, Central, Harding, Kennedy, and

Exhibit 1 Attached to Order and Decree (Cont'd)

Moon. Forty percent of each week will be spent in working in the community.

b. Teacher corps utilize the staff and patrons of the schools to work with patron groups concerning problems of integration and quality education.

(14) All staffs, including Central Office, to represent more than one race effective September, 1969.

(15) Continued in-service education for teachers working with culturally deprived pupils, integrated staffs and student bodies. Continued utilization of Title IV of the Civil Rights Act and other sources of funds.

(16) Strengthen the curriculum by closing small elementary schools. Combine Wright and Spencer attendance areas with pupils attending Spencer Elementary. Combine the University Heights attendance area with Horace Mann, Nichols Hills and Belle Isle. This is consistent with past action of closing Carver, Washington, and Walnut Grove Elementary Schools.

(17) The development and utilization of multi-ethnic instructional materials.

(18) Cease charging pupil fares on existing transportation routes and provide transportation within the rules and regulations of the State Department of Education.

Majority to Minority Transfers

An active program to explain the advantages of the transfer to all pupils and patrons.

Following the example set by the patrons of Wilson and Lincoln, have the patrons of Belle Isle, Buchanan, Burbank,

Exhibit 1 Attached to Order and Decree (Cont'd)

Cleveland, Kaiser, Linwood, Mayfair, Monroe, Sequoyah, Emerson, Garfield, Davis, Shields Heights, Taft, Webster, Southeast, Grant, and other schools desiring to participate, to actively recruit Majority to Minority transfers from Dewey, Edison, Harmony, Longfellow, Polk, Lincoln, Culbertson, Truman, Harding, Kennedy, Moon, and Northeast. Each patron group would work with a specific elementary or secondary attendance area. Patron of goodwill can show that the method will achieve results. Early utilization of the Majority to Minority transfer can continue through the secondary years. Additional staff will assist in recruiting volunteers for the Majority to Minority transfers.

Class size, advantages of the physical plant, curricula offerings can be used as inducements for pupils from Northwest, Grant, Marshall, and other high schools, to transfer to Northeast and Douglass.

Paired Schools

With the phasing out of forty-one Northeast seniors from Harmony, Edison, and Dewey (south of 30th Street), no new pupils from this area will be assigned to Northeast.

Close Harding and Northeast to transfers from black students.

Assign all 1969-70 sophomores from Millwood to Northeast.

Continue Longfellow pupils to Eisenhower Junior High School.

Work toward a goal of a pupil-teacher ratio of 22-1 in the paired schools.

Recruit 250 Majority to Minority (Black) transfers from Northeast to other high schools.

Recruit 200 Majority to Minority (black) transfers from Harding to other junior high schools.

Exhibit 1 Attached to Order and Decree (Cont'd)

Work toward a goal of 70-30, white to black, ratio for 1969-70 at Harding-Northeast.

The assistance of the black and white communities is required to implement the Majority to Minority transfer policy. Consideration will be given to the conversion of the Harding-Northeast schools to middle or magnet schools if the recruitment program is not successful.

Continued efforts to upgrade the curriculum and provide challenging programs for all pupils. Efforts will be made to provide magnet programs or courses to attract pupils city wide. Schools within a school where children can be grouped to their differing needs and talents.

Provide an expanded intramural and sports program.

Continue the utilization of paraprofessionals to relieve teachers of some nonteaching chores.

Recruit outstanding teachers desiring to work in these schools.

A beautification campaign for the campuses of the four schools.

Establishment of joint advisory committees composed of staff, patrons and pupils within the schools.

The Oklahoma City Board of Education believes that boundary changes suggested by The Committee in an attempt to achieve racial balance are not feasible at this time.

Considering some pupils have been in two schools the past two years, moving them again may only intensify the problem in terms of intermediate and long-range objectives.

The Oklahoma City Board of Education has consistently expressed, and desires to maintain, its position of being opposed to the mandatory, or forced, busing of pupils: that is, requiring pupils to be transported from their neighborhood school to attend another school.

A status report of the integration program will be reviewed with the Federal Court.

Exhibit 2 Attached to Order and Decree

(Supplement to Plan for Further Desegregation and Integration of the Oklahoma City School System in the 1969-70 School Year)

Acting in response to instructions of the Court in Case No. Civil-9452 of the United States District Court of the Western District of Oklahoma, to extend the boundary lines of the attendance areas of Harding Junior High School and Northeast High School in conformity with proposals of Willis J. Wheat, the Oklahoma City School Board has drafted the following Section, designated, "Boundary Changes," which will be added to and be a part of the Plan for further desegregation and integration of the Oklahoma City School System in the 1969-70 school year, which Plan was adopted by the Oklahoma City School Board May 30, 1969, and filed in the aforesaid Court case June 12, 1969. This new Section will supercede and replace the first two paragraphs of Page 4 of the May 30, 1969, Plan, relating to boundary changes, which are deleted from the Plan because of their inconsistencies and conflict with the new Section. The new boundary lines of the Harding-Northeast attendance areas will be shown in the official publication of "Boundaries of the Oklahoma City Public School District."

Boundary Changes

The attendance areas of Harding and Northeast will be extended to include the following: All of the attendance areas of Monroe Elementary School, Belle Isle Elementary School, and Burbank Elementary School; and those portions of the attendance areas of West Nichols Hills Ele-

mentary School and Nichols Hills Elementary School which lie south of Wilshire Boulevard; as such attendance areas were designated in the 1968-69 school year.

The following Section designated "Pupils of Longfellow Area in 10th and 11th Grades" will be added to and be a part of the aforesaid May 30, 1969 Plan.

Pupils of Longfellow Area in 10th and 11th Grades

Pupils residing in the Longfellow Elementary School Attendance Area who are in the 10th and 11th grades in the 1969-70 school year will be assigned to Northwest Classen High School.

Exhibit 2 Attached to Order and Decree (Cont'd)

(Report of Adoption of Supplement to Plan for Further Desegregation and Integration of the Oklahoma City School System in the 1969-70 School Year)

[TITLE OMITTED]

Submitted herewith, for approval of the Court, is a Supplement to the Defendant's Plan for Further Desegretion and Integration of the Oklahoma City School System in the 1969-70 School Year, which Plan was adopted by the Oklahoma City School Board May 30, 1969, and filed herein June 12, 1969. The Supplement was approved by the Oklahoma City School Board, by a majority vote of its members.

School Board Members Foster Estes and William F. Lott request the Court to reconsider its decision announced July 29, 1969, and to approve, without the Supplement, the May 30, 1969, Plan.

The School Board requests that the Court order the Board to implement the Supplement, together with the May 30, 1969, Plan, as a single Plan; or the May 30, 1969, Plan; or another Plan.

/s/ J. HARRY JOHNSON
Attorney for the Defendants

Opinion of Court of Appeals dated August 5, 1969

[TITLE OMITTED]

This matter came on for consideration on motion of intervening defendants under Rule 8(a), F.R.A.P., for stay of an order of the District Court for the Western District of Oklahoma, approving a plan of the Oklahoma City School Board for further desegregation and integration of the Oklahoma City School system pursuant to Board of Education of Oklahoma City Public Schools v. Dowell, 375 F.2d 158.

It appears from the pleadings before the Court and statements of counsel that the approved plan involves certain school boundary changes which, if carried into effect, will necessitate the transportation of students from one school attendance area to another, in order to achieve a racial balance. It does not appear from the Court's order or from the approved plan of implementation that any consideration was given to the proviso in Section 407 (a) 2, Title 4, of the Civil Rights Act of 1964, which seems to limit the power of the Court "to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . in order to achieve such racial balance or otherwise enlarge the existing power of the Court to insure compliance with Constitutional standards."

This Court is in doubt concerning the applicability of this limitation on the power of the Court to this case, and inasmuch as it does not appear that the trial court gave consideration to the applicability of the proviso in the order approving the plan, it seems appropriate to vacate the order approving the plan to afford the Court an opportunity to consider the applicability of the Section and to fashion its order accordingly.

This Court expresses no view concerning the application of the limitation to the order entered but reserves judgment until the matter is first considered and decided in the trial court.

IT IS SO ORDERED.

Opinion of District Court dated August 8, 1969 ("Response")

[TITLE OMITTED]

[RESPONSE]

The Court has received an Order from the Court of Appeals (10 C.A.) dated August 5, 1969, and in response thereto has carefully reviewed the entire file in this case, the documents on file; and has carefully considered the evidence offered at the trial of this case, and in compliance with said order the Court responds and orders as follows:

In order to fully clarify the Court's prior Order in this case and to fully advise the Court of Appeals, it is necessary to review this case in part. It is not the Court's intention to file a Brief, but only to review what necessarily confronted the Court in this case and what it necessarily decided.

In *Brown* v. *Board of Education of Topeka*,[1] the Supreme Court held that segregation in the public schools denies Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment; and in *Brown* v. *Board of Education*,[2] the Court ordered desegregation of the public schools "with all deliberate speed," and placed upon the school authorities the primary responsibility for solving the various local school problems required to implement the governing Constitutional principles, and as said in *Green* v. *County School Board*,[3]

> "to fashion steps which promise realistically to convert promptly to a system without 'white' schools and 'Negro' schools, but just schools."

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[1] 347 U.S. 483 (May 17, 1954).

[2] 349 U.S. 294 (May 31, 1955).

[3] 391 U.S. 430 (May 27, 1968).

and the Supreme Court decisions, supra, further placed upon the District Court, the obligation to assess the effectiveness of plans submitted by the local school authorities.

It was, therefore, incumbent upon this Court to determine whether the plan submitted by the Oklahoma City School District, and as amended, entitled "Report of Defendant's Plan for Further Desegregation and Integration of the Oklahoma City School System in the Year 1969-70 School Year" and "Report of Adoption of Supplement to Plan for Further Desegregation and Integration of the Oklahoma City School System in the Year 1969-70 School Year" was a good faith plan, and if so, to approve it, and if not to disapprove it.

Circuit Court Order

The Court of Appeals said in its Order of August 5, 1969:

> "* * * and inasmuch as it does not appear that the trial court gave consideration to the applicability of the proviso in the order approving the plan * * *" (Title 42 U.S.C.A. Sec. 2000c-6, Civil Rights Act, 1964)

In this, the Court of Appeals is all wrong, and it is not so. The Trial Court did study and carefully consider this statute.

In 1963 when the Trial Court requested the Oklahoma City School Board to submit for the benefit of the public and of the Court a good faith plan for desegregation, the then Board declined to do so.

Thereafter, the Court appointed three experts who submitted to the Court and to the public a partial desegregation plan which the Court found to be submitted in good faith, and it was adopted by the Court and ordered put into execution.

This plan, submitted by the experts, provided for changes in the attendance school district boundary lines and for bussing, to put the plan into effect as a step toward desegregation of the public schools.

The Court out of precaution, however, not believing the Civil Rights Act in anywise applied to the desegregation plan but because the plan was submitted on order of the Court, the Court said in its Order of September, 1965:

> "And it is therefore ordered that no inference may be drawn from this Order that transportation by public school buses is indicated or inferred."

The Court of Appeals in affirming this Court's September, 1965, Order said:

> "The Court ordered transfer plan placed no bussing requirement upon the school system."

On May 30, 1969, the School Board filed, for the benefit of the public and this Court, its plan for further desegregation of the school system, and on July 29, 1969, the Court held the plan not a good faith desegregation plan and requested the School Board to reconsider in the light of three days' testimony they had heard, and in the light of counsels' argument on the law, all in open court, and thereafter on August 1, 1969, for the first time in 15 years the defendant School Board filed, together with its amendment, referred to above, a good faith desegregation plan.

The May 30 and August 1, 1969, plans combine to make one complete plan showing on its face to be a plan to desegregate the schools as required by *Brown 1*, *Brown 11*, *Green*, *Rany* and *Monroe* decisions and many others. The plan was approved by the Court as being one for the desegregation of the school system and as being a satisfactory

one to further the dismantling of state-imposed segregation and the state-imposed dual school system prevailing in Oklahoma since statehood. The Court in approving the plan submitted did so with the belief and hope that the plan would be a forward step toward disestablishing state-imposed segregation as required in *Green*, supra.

Oklahoma State Policy on Bussing
70 O.S.A. 9-1

Oklahoma City Board of Education
Policy on Bussing

In 1921 and later in 1961 the Oklahoma Legislature provided for the bussing of pupils or students to any assigned school where the travel distance was more than one and one-half miles.

The Oklahoma City School District has followed the State policy as enunciated by the State Legislature, and has in many places for many years provided bussing for pupils and students to their assigned schools.

The plan of May 30, 1969, and as supplemented by the amended plan of August 1, 1969, by point No. 18 provides:

> "Cease charging pupil fares on existing transportation routes and provide transportation within the rules and regulations of the State Department of Education."

Point No. 18, supra, of the School Board Plan submitted to, and approved by the Court; referring to bussing was not a plan with reference to forced bussing, but was in compliance with the State policy and School Board policy and was an aid in desegregation and, incidentally, an aid in preventing resegregation in Harding Junior High School and Northeast High School.

Opinion of District Court dated August 8, 1969

Civil Rights Act 1964
Title 42 U.S.C.A.; 2000-6

The Court of Appeals said in its reeent order that the Civil Rights Act, above, seems to limit the power of the Court.

The Civil Rights Act of 1964, above, contains many provisions for the relief of abuses to the Negro, and Congress in its effort to aid the Courts in the problem of desegregation provided that the Commissioner of Education have power to aid all states in their school desegregation problems as required in *Brown 1* and *11* and gave to the Commissioner authority to work with and aid the school boards, especially in all states which had from time immemorial maintained de jure segregated schools, (southern states including Oklahoma). In the Act, Congress provided that in cases where parents of children complained of unequal protection of the law in school matters, the Attorney General of the United States was authorized to investigate such complaints, determine if the complaints were true, and Congress said:

> "The Attorney General is authorized, after giving notice of such complaint to the appropriate school board * * * and after certifying that he is satisfied that such board * * * has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that *nothing herein** shall

* Emphasis supplied.

empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another * * * to achieve such racial balance * * *." The words official or court of the United States, no doubt, means an official of the United States and a court of the United States.)

Nowhere does this Act limit in any way any desegregation plan of any school board, nor does the Act in any way restrict or limit the District Courts in approval of any plan of any school board in its effort to comply with the law requiring desegregation.

On the other hand, it is quite apparent that it was the desire of Congress that local school boards would take the necessary steps to effectively and truly desegregate the schools.

Furthermore, the transportation referred to in the defendant School Board's plan, point 18, supra, is not solely its own policy, but based upon and authorized by the laws of the State of Oklahoma.

This Court was at all times, prior to and during the trial of this case, fully aware of, and did in fact consider the Civil Rights Act of 1964, Title 42, Sec. 2000c-6, and the Court concluded that the proviso contained in the Civil Rights Act relating to transportation of pupils was not applicable in this case. The Court further concluded that the Civil Rights Act, supra, did not and does not prohibit the State of Oklahoma or the Oklahoma City School District, defendant herein, from providing transportation for students within the district, consistent with clause 18 of the plan submitted, above quoted, and as authorized by Oklahoma Statute 70 O.S.A., Sec. 9-1. It cannot be said

that this Act of the legislature was enacted in contemplation of racial problems.

The Court further took into consideration in approving the plan submitted that there is no law which prohibits the school officials from changing and rearranging school attendance areas, boundaries, or changing school attendance areas as relates to children in various grades in the public schools, even if changed for the avowed purpose of dismantling state-imposed segregation, and if in order to accomplish this purpose, the school district elects to furnish transportation for the children, this does not violate any Federal Law, including the Civil Rights Act.

The argument that the School Board plan, "would force bussing to overcome racial imbalance," is ridiculous and without merit. It would not be forced bussing because students have a right to attend their boundary attendance school by their own transportation, to-wit: walking, car pool, parent transportation, or any other method they choose to use. The School Board furnishes transportation only if requested and desired by the pupils, students and parents. Likewise, there is no merit in the argument that race may not be taken itno account for purposes of desegregation of state-imposed segregation in the schools. In some instances, as in this case, there is no way of undoing the effects of past state-imposed discrimination and segregation except by taking race into account. *Board of Public Instruction of Duvall County* v. *Braxton*, 402 F.2d 900 (5th C.A.) (Aug. 29, 1968).

In *United States* v. *School District 151 of Cook County, Illinois*, 404 F.2d 1125 (Jan. 27, 1969), the Court said at page 1130:

> "The Constitution forbids the enforcement by the Illinois School District of segregation of Negroes from

> Whites merely because they are Negroes. The congressional withholding of the power of courts in Section 2000c-6 (Civil Rights Act) cannot be interpreted to frustrate the constitutional prohibition. The order here does not direct that a mere imbalance of Negro and White pupils be corrected. It is based on findings of unconstitutional, purposeful segregation of Negroes, and it directs defendants to adopt a plan to eliminate segregation and refrain from the unlawful conduct that produced it."

and at page 1135 the Court said:

> "Consideration of racial factors in undoing unconstitutional segregation are permissible. Wanner v. County School Bd., 357 F.2d 452 (4th Cir. 1966)."

Inasmuch as the Court of Appeals has by its Order vacated this Court's Order and Decree dated August 1, 1969, and called for the above statement from this Court, the Court now enters its Decree as directed by the Court of Appeals.

Dated this 8th day of August, 1969.

/s/ LUTHER BOHANON
United States District Judge

Order and Decree dated August 8, 1969

[Title Omitted]

ORDER AND DECREE

In keeping with the order of the appellate court, "to fashion its order accordingly," this Decree is entered:

The defendant, the Board of Education of the Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, a public body corporate, having filed herein its plan for the further desegregation of the Oklahoma City School System, this Court has carefully considered and re-examined said plan for, and to become effective for the school year 1969-70. This Court having considered all of the evidence, facts, argument of counsel and the applicable law to this case is of the opinion that said plan in all things should be approved.

This Court, at the suggestion of the appellate court, has reviewed and reconsidered the Civil Rights Act of 1964, public law 88-352, Title 4, Sec. 407, 78 Stat. 248, 42 U.S.C.A. 2000c-6, and is of the opinion that it does not apply to this case.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The plan for the further desegregating the public school system of Oklahoma City as submitted by the Board of Education of the Oklahoma City Public Schools, defendant herein, be, and the same is hereby in all respects approved.

2. It is further decreed by the Court that the defendant Board of Education of the Oklahoma City Public Schools prepare on or before November 1, 1969, for the benefit of

the public and for this Court's consideration a full, comprehension plan for the complete desegragation of the Oklahoma City School System as to students, faculty and employees of all grades employed by said defendant district.

Dated this 8th day of August, 1969.

/s/ LUTHER BOHANON
United States District Judge

Order and Decree dated August 13, 1969

[Title Omitted]

ORDER AND DECREE

The Tenth Circuit Court of Appeals having issued its Mandate in this case which was filed with the Clerk of this Court on this day, the Order set out in the Mandate is identical to the Order received by this Court on August 7, 1969, and this Court having filed its Response and its Order as directed by the Appellate Court "to fashion its Order accordingly,"

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The plan for the further desegregating the public school system of Oklahoma City as submitted by the Board of Education of the Oklahoma City Public Schools, defendant herein, be, and the same is hereby in all respects approved.

2. It is further decreed by the Court that the defendant Board of Education of the Oklahoma City Public Schools prepare on or before November 1, 1969, for the benefit of the public and for this Court's consideration a full, comprehensive plan for the complete desegregation of the Oklahoma City School System as to students, faculty and employees of all grades employed by said defendant district.

Dated this 13th day of August, 1969.

/s/ LUTHER BOHANON
United States District Judge

Order on Motion to Stay of District Court dated August 14, 1969

[Title Omitted]

ORDER ON MOTION TO STAY

The Court, having very carefully studied the Motion of the protestants to stay the desegregation plan of the Oklahoma City School System, concludes as follows:

1. The Constitution of the United States requires the immediate execution of the School Board plan.

2. The protestants are without an appealable interest, and their Constitutional rights are not affected by the execution of the School Board plan.

3. The protestants admittedly represent only a small fragment of the total Oklahoma City school population and should not be permitted to thwart the overall plan that affects so many non-protesting patrons.

4. The protestants do not truly represent a true class of the school students inasmuch as there are no Negroes in the class purportedly represented by the protestants.

5. The Board of Education of the Oklahoma City School District is the only true party representing all of the school children of the district and is the true party in interest, and this Board, as a governmental agency of the State of Oklahoma, has proposed, on behalf of all of the affected school children, the desegregation plan approved by the Court. 70 O.S.A. 4-22.

6. The record discloses that the execution of the School Board desegregation plan will work a hardship and incon-

venience on some students and some parents, however, such hardship and inconvenience does not present a Constitutional question. The School Board obviously took these matters into consideration.

7. A failure to execute the desegregation plan of the Oklahoma City School Board would violate the Constitutional rights of the Negro student by continuing the condemned and unconstitutional State-imposed segregation of the past.

IT IS, THEREFORE, ORDERED AND DECREED that the Motion for Saty of the execution of the Oklahoma City School Board plan of desegregation be, and the same is hereby denied.

Dated this 14th day of August, 1969.
Judgment Entered in Civil Docket on

Aug 14 1969
JOSEPHINE P. GORE *Deputy*

/s/ LUTHER BOHANON
United States District Judge

Opinion and Order of Court of Appeals dated August 27, 1969

MEMORANDUM AND ORDER ON MOTION TO STAY

The immediate and pressing matter before us is whether we shall stay an order of the District Court, formally approving another court-prompted step in the process of desegregating and integrating the Oklahoma City School System. The order is a sequel to one sustained in this case in 375Fd 2nd 158. On that appeal, we sustained the court's finding that the Oklahoma City School System had been totally segregated by force of state law since its inception and that the Board had failed to heed the mandate of the Supreme Court in Brown vs. Board of Education, 347 U.S. 483, "to take such proceedings and enter such orders and decrees * * * as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed * * * *".

As originally cast this suit by Dowell, a negro representing his race and class, sought transfer from a predominately negro school to which he was assigned to a predominately white school in another attendance area.

Dowell contended, and the trial court held, that the transfer was denied solely because of his race. The trial court condemned the prevailing minority-to-majority transfer and gerrymandering policies of the school board as unconstitutional and void, and ordered the Board to file with the Clerk of the Court all pertinent information used or adopted in the formation of certain named school attendance areas to the end that the court may determine whether they were created in good faith or intended to perpetuate segregation. Jurisdiction was retained to assure full and complete compliance. See Dowell vs. School Board, 219 F. Supp. 427.

The next remedial step, reported in 244 F. Supp. 971, required the School Board to pair and consolidate four different attendance areas, with each school housing different grades, and to inaugurate a volunteer majority-to-minority transfer policy, space permitting.

We affirmed this order and emphasized the equitable powers of the trial court to fashion a remedy which would completely disestablish segregation in the Oklahoma City school system and establish in its place an integrated nonracial educational system. We thought this could be done without condemning or striking down the convenient neighborhood school attendance concept, provided such attendance formula was not used as "a mask * * * to perpetuate racial discrimination".

The order now under attack is a further step in the desegregatory process. The effect of this order is to extend the attendance boundary lines so as to bring additional attendance areas, hence additional pubils, into the previously consolidated attendance areas. The result is that students in these areas will be required to attend schools other than those in their neighborhood which they would normally attend. The affected class of students was permitted to intervene to assert their interests.

The intervening classes contend that the last boundary changes require them to be transported from one attendance area to another attendance area for the sole and only purpose of achieving a racial balance in violation of declared congressional policy and without any showing that it bears any reasonable relationship to equal educational opportunities in an environment of equal respect and dignity under law. They assert their constitutional right not to be transported from their neighborhood schools to

another school 4 or 5 miles away solely because of their race. They seem to suggest that no one has a constitutional right to a remedy against the equal right of others.

The School Board has the first positive duty to eradicate the state-imposed or sanctioned biracial educational system, and to replace it with a unitary non-racial system. Indeed, it is publicly committed "to desegregate and integrate the total Oklahoma City Public School system". The trial judge has the undoubted power to see that it is done with all reasonable dispatch. When the Board falters he must improvise the appropriate remedial measures. It is not the province nor the disposition of this court to interfere with the trial court's considered judgment concerning the remedial measures to be taken in cases like this. The trial judge's judgment is entitled to great respect and weight and we will interfere only to the extent necessary to determine whether the remedial measures taken are within statutory and constitutional limits.

The Civil Rights Act of 1964 (§401(b)) defines "desegregation" to mean the assignment of students to public schools without regard to race or color, religion or national origin, but that does not mean the assignment of students to public schools in order to overcome racial imbalance. An Section 407(a) of the same Act provides in effect that in a suit instituted by the Attorney General in the name of the United States, to redress violations of the Civil Rights Act, the Court exercising appropriate jurisdiction shall not be empowered to "issue any order seeking to achieve racial balance in any school by requiring the transportation of pupils or students from one school to another * * * in order to achieve such racial balance * * *."

On remand to the trial court to determine the applicabil-

ity of this Act, the court was sure that the Act was inapplicable to a suit like ours by a private person to redress the deprivation of the constitutional right to educational equality. The court may well be right. It may also be correct in the apparent belief that the traditional neighborhood concept must yield to the overriding power of the court to fashion an adequate remedy for desegregation and integration of the Oklahoma City schools. Nothing we shall say or do here is intended to repudiate or derogate from the court's power to fully integrate the Oklahoma City School system. But the remedy is drastic and has been applied sparingly and reluctantly. Surely no one will say that it is not fraught with constitutional complexities. In any event, this panel of the court is divided and in doubt. It is not uncommon for questions of transcendent importance like this to be heard and decided by the whole court. Since this order was entered, and apparently after this appeal was taken, two additional classes—one white and one negro—have sought intervention, claiming that the supplemental plan would require cross-transportation of races from one school attendance area—contiguous and non-contiguous—into another attendance area.

An appeal has been taken from the order denying intervention. The contention is that they are constitutionally entitled to be left alone in the absence of a clear showing that cross-transportation of the races is essential to the integration process. Then, too, the trial court's challenged order approving the plan significantly requires the School Board to "Prepare and file with the Clerk of the Court on or before November 1, 1969, a full, comprehensive plan for the complete desegregation and integration of the Oklahoma City Public School system as to students, faculty and

employees of all grades * * *." Any such plan may very well invade other interests not now affected by the supplemental order.

Each remedial step affects the interest and rights of additional persons. Their right to be heard is fundamental and undeniable. Their interest is not represented by the School Board, which has taken no appeal. This litigation does not lend itself to piecemeal consideration and disposition, though the ultimate relief may be afforded step-by-step.

It is also important to note that substantially the same questions are presented under variant facts in No. 432-69, School District No. 1, Denver, Colorado, et al vs. Wilfred Keyes, et al. We have considered the two cases together in order to reach some fundamentally consistent decision. This brings us to the conviction that this litigation should be presented and decided on the basis of the full and comprehensive plan for complete desegregation and integration of the Oklahoma City Schools, which the court has ordered submitted to it on or before November 1, 1969. In this manner, and only in this manner, can we be assured that the interest of all persons affected by the integration orders can be represented at the trial level and here. We think it inappropriate to decide the questions presented here at this stage of the proceedings when the judgment may adjudicate litigable interests not now before the court.

The questions whether the stay should be granted pending the determination of the total plan for integration involves the balancing of the interest of those who assert deprivation of equal educational opportunities and equal respect and dignity under law against those who now assert the constitutional right not to be transported to another school solely by reason of their race and to achieve a racial

balance in the community. On balance, it seems appropriate and in the public interest to grant this stay to afford the trial court an opportunity to consider the full and comprehensive plan for the desegregation and integration of the Oklahoma City school system so that the whole matter, with all its legal implications, may be considered by this court in one case. The parties may be assured that any appeal to this court will be procedurely expedited and timely considered.

The order of the court is vacated and the case is remanded to the trial court for consideration and adoption of a full and comprehensive plan for the complete desegregation and integration of the Oklahoma City School system as contemplated in the court's order of August 13, 1969.

The mandate shall issue forthwith.

Mandate

On August 27, 1969, the mandate of the United States Court of Appeals for the Tenth Circuit, in accordance with the order of said court, was issued to the United States District Court for the Western District of Oklahoma.

Order by Mr. Justice Brennan dated September 2, 1969

[Title Omitted]

ORDER

UPON FURTHER CONSIDERATION of the motion submitted by the applicants to vacate the order of the United States Court of Appeals for the Tenth Circuit issued in this case on August 27, and to reinstate the order of the United States District Court for the Western District of Oklahoma issued on August 13, and of the opposition thereto,

IT IS ORDERED that my order of August 29 is superseded and the order of the United States Court of Appeals for the Tenth Circuit is vacated and the order of the United States District Court for the Western District of Oklahoma is reinstated provided a petition for a writ of certiorari is filed by the applicants within fifteen (15) days from the date of this order. Should such a petition be so timely filed, this order is to remain in effect pending this Court's action on the petition. In the event the petition for a writ of certiorari is denied, this order is to terminate automatically. Should the petition for a writ of certiorari be granted, this order is to continue in effect pending the issuance of the judgment of this Court.

/s/ WILLIAM J. BRENNAN
Acting Circuit Justice

Dated this 3 day
of September, 1969.

Order Dissolving Three-Judge Court

(Filed July 10, 1962)

ORDER DISSOLVING THREE-JUDGE COURT

[Title Omitted]

This action was brought by Robert L. Dowell, a minor child of the negro race by and through his father as next friend, and as a class action in behalf of all others similarly situated, against the Board of Education of the Oklahoma City Public Schools, Independent District No. 89, and the individuals, in their capacities as set forth in the caption.

The original and amended complaint of plaintiff, insofar as this order is concerned, may be considered as setting forth the same complaints and asking for the same relief. The amended complaint seeks to strike down all Constitutional and statutory provisions of the State of Oklahoma relating to segregation of the races in the public schools. Defendants admit, in their answer, that all of these Constitutional and statutory provisions are unconstitutional. The real question posed by the pleadings is the application by defendants of Section 4-22 of Title 70, Oklahoma Statutes Annotated. Plaintiff admits that this section is Constitutional on its face, but contends that it is unconstitutionally applied. Defendants, by their answer, state that all actions taken by them were under the authority of this statute only, and that it is not being and has not been unconstitutionally applied.

The jurisdiction of the Court is invoked pursuant to Title 28 U.S. Code, Section 1343 (3) as a suit in equity authorized by Title 42 U.S. Code, Section 1983, seeking to redress the deprivation, under color of law, regulation, custom and usage, of rights, privileges and immunities secured by the

due process and equal protection clauses of the United States Constitution, 14th Amendment, Sec. 1, and rights protected by Title 42 U.S. Code, Sections 1981 and 1983. Plaintiff contended that the subject matter of this action is cognizable by a statutory three-Judge District Court, Title 28 U. S. Code, Sections 2281 and 2284, being a civil action for permanent injunction, and to enjoin and restrain the enforcement, operation and execution of a State statute.

Under the complaint, seeking the relief above mentioned, Honorable Luther Bohanon, District Judge for the Western, Eastern and Northern Districts of Oklahoma, made the initial requisite declaration that a substantial Federal question was involved, notified the Honorable Alfred P. Murrah, Chief Judge, Tenth Circuit Court of Appeals of the filing of the case. A three-Judge District Court, comprised of Chief Judge Murrah, Honorable Fred Daugherty and Honorable Luther Bohanon, District Judges, was constituted by order of Chief Judge Murrah.

The three-Judge Court as so constituted, heard the evidence of all the parties concerned in order that the matter would not be delayed in the event it was finally determined that a three-Judge Court had jurisdiction.

Section 4-22 Title 70, Oklahoma Statutes Annotated, authorizes Boards of Education "to designate the schools to be attended by the children of the District." The evidence shows that the plaintiff came from a dependent school district, where there was no high school, into the defendant school district, and made his election to attend Douglass High School. After attending Douglass High School for one year, he then made an application to be transferred from Douglass High School to Northeast High School because a course of study offered at Northeast High School was not available at Douglass High School, and this trans-

fer was permitted on the condition that the plaintiff enroll in this course of study and diligently pursue the same.

The plaintiff's evidence failed to show that the above mentioned statute is or was unconstitutionally applied by the defendants.

Under the pleadings and evidence the Court is of the opinion that there is no justiciable controversy presented as to any of the constitutional or statutory provisions set out in the plaintiff's first amended complaint, and there remained only for determination the question relating to defendant's application of the above mentioned statute. There was no evidence to show that the unconstitutional provisions of the Oklahoma Constitution and the unconstitutional statutes of Oklahoma relating to segregation of the races in public schools have been used and there is no controversy with respect thereto and nothing to strike down. Under the pleadings there was only the issue as to defendant's application of Section 4-22 Title 70, Oklahoma Statutes Annotated. This issue is a factual one and does not address itself to a three-Judge Court.

It further appears from the evidence that there has been no order made or promulgated by the defendants acting under the above statute, within the purview of 28 U. S. Code Section 2281, which the plaintiff presents or points out to be unconstitutional by discriminating against the plaintiff and his class by reason of race or color.

It is always the duty of any Court to inquire into its jurisdiction, and in view of what has been above set forth this Court holds that it is without jurisdiction, and is of the opinion that the subject matter of this suit is properly one for determination by one Judge. The case having been originally assigned to Honorable Luther Bohanon, District Judge, it is hereby reassigned to him for further

Order Dissolving Three-Judge Court

procedings, and this three-Judge statutory Court is hereby dissolved.

ENTERED this 10 day of July, 1962.

/s/ ALFRED P. MURRAH
ALFRED P. MURRAH, *Chief Judge, Tenth Circuit Court of Appeals*

/s/ LUTHER BOHANON
United States District Judge

/s/ FRED DAUGHERTY
United States District Judge

Pretrial Order and Stipulations

[Title Omitted]

ADMITTED FACTS

It is agreed that the defendant, Independent School District No. 89 of Oklahoma County, is an independent school district existing under the laws of the State of Oklahoma; that at the time of filing this action Otto F. Thompson, Phil C. Bennett, William F. Lott, Eloise Welch (otherwise known as Mrs. Warren E. Welch), and Luke F. Skaggs, Jr., were all of the members of the Board of the Defendant School District; that since the filing of this action Foster Estes has succeeded Luke F. Skaggs, Jr., as member of said Board and has been by the order of this Court substituted as a defendant in the stead of said Skaggs; that Jack F. Parker is Superintendent of the Schools of the Defendant School District and that M. J. Burr is Assistant Superintendent of such schools.

It is agreed that the plaintiffs are a father and minor son, citizens of the United States and the State of Oklahoma, and that they are members of the Negro race; that the minor plaintiff resides with his parents in a school district adjoining the Defendant Independent School District No. 89 of Oklahoma County (last named school district 89 is mentioned hereinafter as Defendant School District); that the school district of the residence of the plaintiff does not, but the Defendant School District does offer courses of instruction above the 8th grade level; that the minor plaintiff is a pupil of the 10th grade; that the minor plaintiff made application to the County Superintendent of Schools of Oklahoma County that such minor plaintiff be transferred from his home school district to the defendant school district for the reason that the home district of the

minor plaintiff did not offer instruction above the 8th grade level; that the first of said applications was made for the school year of 1960-61 Exhibit "1" and that the second was made to cover the school year of 1961 and 1962; Exhibit "2"; that each of said applications was granted by the County Superintendent of Schools of Oklahoma County as is evidenced by the copies of such transfers which have been furnished to and filed with the Clerk of this Court, which copies are exact copies of the originals of said applications for and grant of such transfers, and that the same may be introduced in evidence without further identification. That after the granting of said application for the school year 1960-61 the minor plaintiff entered Douglass High School, one of the schools of the defendant school district that is attended solely by pupils of the Negro race.

It is agreed that after the granting of the transfer to the minor plaintiff for the year 1961-62 that the plaintiffs made application to the defendant school district for permission to attend as a pupil, Northeast High School which is high school of the defendant school district, located in an area that is predominately populated by members of the white race and is attended by both Negroes and white children.

Thereafter the plaintiffs and their attorney, Mr. Green, appeared before the Board of Education of the Defendant School District and after discussion of said request a minute was made of said meeting, a copy of which minute has been filed with the Clerk of this Court, and it is stipulated that said copy of said minute may be introduced in evidence without further identification, Exhibit "3".

It is agreed that the Board of the Defendant School District by a unanimous vote adopted on August 1, 1955, the resolution of desegregation; a copy of which is attached

hereto as Exhibit "4", which copy may be introduced in evidence without further identification.

It is agreed that thereafter the Board of the Defendant School District adopted a map, a copy of which has been delivered to the Clerk of the Court, which map showed what is commonly called attendance areas, that is, it showed the area of the school district surrounding various schools and the Board provided that an individual within the attendance area of a school be a pupil of and attend the school of that particular area, Exhibit "5".

It is agreed that there are now white children of high school age who live within the Douglass High School attendance area that are not attending Douglass High School and that there are Negro children now attending Douglass High School who live outside of the Douglass attendance area.

STIPULATIONS

The parties to this action stipulate and agree as to the following for the purpose of the trial of the issues. Each party, however, reserves the right to object to the introduction of any evidence as to any fact on the ground of competence, relevancy, or materiality.

1.

It is stipulated and agreed by plaintiff and defendant that there are no amendments to be made to plaintiff's first amended complaint and that there are no amendments or additions to be made to the defendant's answer to plaintiff's first amended complaint.

2.

Defendant stipulates and agrees that plaintiff has served proper five day notice on the Governor of the State of Oklahoma and the Attorney General of the State of Oklahoma as provided by law for a Three Judge Federal Court proceeding.

3.

It is stipulated and agreed between plaintiff and defendant that this Court has jurisdiction of the subject matter of this case.

A. The defendant contends as stated in their amended answer that the plaintiffs are not entitled under the law and the facts in this case to have a three Judge Court convened to hear this matter.

B. Plaintiffs contend that the subject of this lawsuit is cognizable by a statutory three Judge Court and that a three Judge Court must determine its jurisdiction.

4.

It is stipulated and agreed by plaintiff and defendant that the following provisions of the Oklahoma constitution and the State statutes of the State of Oklahoma as are now carried on the statute books of the State of Oklahoma, and being unrepealed, are unconstitutional under the Constitution of the United States of America by reason of the decisions of the Supreme Court in the Brown case of May 17, 1954 and subsequent segregation opinions, to-wit:

(1.) Declare that provision of Section 5, Article 1, of the Constitution of Oklahoma, which reads: "And pro-

vided, further, that this shall not be construed to prevent the establishment and maintenance of separate schools for white and colored children," is unconstitutional and void;

(2.) Declare that Section 3 of Article XIII of the Constitution of Oklahoma, which reads:

"Separate schools for white and colored children with like accommodations shall be provided by the Legislature and impartially maintained. The term 'colored children' as used in this Section, shall be construed to mean children of African descent. The term 'white children' shall include all other children," to be unconstitutional and void;

(3.) This provision hereafter treated.

(4.) Declare Section 5-1 of Title 70, Oklahoma Statutes, Separation of races; Impartial facilities. "The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races with impartial facilities for both races." Laws 1949, p. 536, Art. 5, Sec. 1, unconstitutional and void;

(5.) Declare Section 5-2 of Title 70, Oklahoma Statutes, definitions. "The term 'colored,' as used in the preceding section, shall be construed to mean all persons of African descent who possess any quantum of Negro blood, and the term 'white' shall include all other persons. The term 'public school' within the meaning of this Article shall include all schools provided for or maintained, in whole or in part, at public expense." Laws 1949, p. 536, Art. 5, Sec. 2, unconstitutional and void;

(6.) Declare Section 5-3, of Title 70, Oklahoma Statutes, separate school defined. Designation. Membership of dis-

trict board. "The separate school in each district is hereby declared to be that school in said school district of the race having the fewest number of children in said district. Provided, that the county superintendent of schools shall have authority to designate what school or schools in the school district shall be the separate school or schools and which class of children, either white or colored, shall have the privilege of attending such separate school or schools in said school district. Members of the district school board shall be of the same race as the children who are entitled to attend the school of the district, not the separate school." As amended Laws 1953, p. 423, Sec. 15, unconstitutional and void;

(7.) Declare Section 5-4, of Title 70, Oklahoma Statutes, teacher permitting child to attend school of other race. "Any teacher in this state who shall wilfully and knowingly allow any child of the colored race to attend the school maintained for the white race shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), and his certificate shall be cancelled and he shall not have another issued to him for a term of one (1) year." Laws 1949, p. 537, Art. 5, Sec. 4, to be unconstitutional and void;

(8.) Declare Section 5-5, of Title 70, Oklahoma Statutes, maintaining or operating institution for both races. "It shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution of this State where persons of both white and colored races are received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school, or institution in violation

hereof shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and each day such school, college or institution shall be open and maintained shall be deemed a separate offense." Laws 1949, p. 537, Art. 5, Sec. 5, to be unconstitutional and void;

(9.) Declare Section 5-6, of Title 70, Oklahoma Statutes, teaching in institution receiving both races. "Any instructor who shall teach in any school, college or institution where members of the white and colored race are received and enrolled as pupils for instruction shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense, and each day any instructor shall continue to teach in any such college, school or institution shall be considered a separate offense." Laws 1949, p. 537, Art. 5, Sec. 6, to be unconstitutional and void;

(10.) Declare Section 5-7, of Title 70, Oklahoma Statutes, white person attending institution receiving colored pupils. "It shall be unlawful for any white person to attend any school, college or institution where colored persons are received as pupils for instruction, and anyone so offending shall be fined not less than five dollars ($5.00) nor more than twenty dollars ($20.00) for each offense, and each day such person so offends as herein provided shall be deemed a distinct and separate offense: Provided nothing in this Article shall be construed as to prevent any private school, college or institution of learning from maintaining a separate or distinct branch thereof in a different locality." Laws 1949, p. 537, Art. 5, Sec. 7, to be unconstitutional and void;

(11.) Declare Section 5-8, of Title 70, Oklahoma Statutes, support and maintenance of Separate Schools. "The annual budget of each school district maintaining separate schools for white and colored children shall provide for the support and maintenance of both the school or schools for the white children and the school or schools for the colored children." As amended Laws 1955, p. 423, Sec. 16, to be unconstitutional and void;

(12.) Declare Section 5-11, of Title 70, Oklahoma Statutes, transfer of pupils. "When any school district having both white and colored children of school age does not maintain schools for both races, the county superintendent of schools shall transfer the children of the race for which a school is not maintained to a school of their own color in another district when the same can be done with the consent of their parents, guardians or custodians, or without such consent when such children can be transferred without compelling them to walk more than one and one-half miles to attend such school; provided, that such children may be required to travel more than one and one-half (1½) miles when proper provision is made for the transportation of such children, and the consent of the parents, guardian or custodian of any child being required to travel more than one and one-half (1½) miles shall not be required when such transportation is furnished." As amended Laws 1955, p. 424, Sec. 18, to be unconstitutional and void;

5.

It is further stipulated between plaintiff and defendant in relation to the foregoing articles of the Oklahoma Constitution and sections of the Oklahoma statutes, that the

plaintiff will offer no oral testimony showing a use of the said Articles of the Oklahoma Constitution and sections of the Oklahoma state statutes in the operation of defendant schools.

A. Except plaintiff reservies the right to contend that the defendants have continued to operate and are now operating segregated schools under said statutes or otherwise contrary to the decisions of the Supreme Court of the United States, under said designated Articles of the Constitution and statutes.

PLAINTIFFS' PRINCIPAL ISSUE

(Item 3, Above Referred To)

Oklahoma Statutes, Title 70, Section 4-22 authorizes Boards of Education in part as follows: "To designate the schools to be attended by the children of the district."

Plaintiffs say the foregoing is unconstitutional as applied to and used by defendants as to these plaintiffs and as to members of the class of persons that plaintiffs represent who are similarly situated because of their race and color.

The defendants' contention is that the last mentioned statute is constitutional and that any question that can be raised in this cause by the plaintiffs as to the application and use of said statute in this matter is purely factual.

PLAINTIFFS' PROOF

Plaintiff may offer such proof as he may have showing a trend of conduct during the preceding five years prior to September, 1960, establishing the grievance set out in the complaint, and in this connection, plaintiff will have the following witnesses:

Alex H. Higdon, Superintendent of Schools, Oklahoma County;

M. J. Burr, Assistant Superintendent of Defendant Schools;

Nora Belle Oringdorff.

Plaintiffs' witnesses expected to testify with reference to the specific alleged grievances:

T. P. Cherry, Oklahoma City;

M. O. McDaniels, Douglass High School;

F. D. Moon, former Principal, Douglass High School;

Ira D. Hall, Page Elementary School;

Mrs. Ruby Flenring, Woodson Elementary School;

B. V. Watkins, Dunbar Elementary School;

William Johnson, Creston Hills Elementary School;

Mrs. Mary Moulder, Principal, Truman Elementary School;

Delbert Burnett, Culbertson Elementary School;

Mrs. Hazel Kibler, Lincoln Elementary School;

Lederle Scott;

Mrs. Etoise Flenoid, Oklahoma City;

John Flenoid, Oklahoma City;

Gloria Burse.

Plaintiffs reserve the right to submit to defendants any witnesses plaintiffs may desire to use ten days before trial.

Defendants' Proof

Defendants' conception of the issue in this cause is not that set forth by the plaintiffs, but that under the segregation opinions of the Supreme Court of the United States, the province of this Court is to determine whether or not the defendants have adopted a plan which is a good faith attempt to comply with the said decisions on desegregation as rapidly as possible, all things being considered; and that by those decisions the local School Board has imposed on it the duty of devising such a plan, and the contention will be that the plan adopted by the Defendant District is such reasonable plan which entitles if to be approved by this Court, and that all complaints by the plaintiffs are made of actions honestly and in good faith done under said plan.

Witnesses who may be called to testify in addition to the defendants are:

> Nellie Melton and John C. Pearson, Jr., former members of the School Board;

and in general personnel employed by the School District, all of whom, in the belief of the defendants, have been named as witnesses by the plaintiffs.

Trial Date

On information from Judge Murrah's office and Judge Daugherty's office that they will be available for April 3, 1962, it is stipulated and agreed by all parties concerned that the trial of this case will commence on April 3, 1962 at the hour of 9:30 a.m. and continue thereafter until submitted.

EXHIBITS

Attached is a map or plat showing Pleasant Hill District D-45, and attendance area covering Douglass High School and Northeast High School, which is admitted in evidence and made a part of this stipulation, being Exhibit "B".

Dated this 26th day of January, 1962.

LUTHER BOHANON
Luther Bohanon, U. S. District Judge

APPROVED:

JOHN E. GREEN
For the Plaintiff

W. A. LYBRAND
For the Defendant.

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FILED
OCT 14 1969
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 603

ROBERT L. DOWELL, an infant, who sues by A. L. DOWELL, his father and next friend, *et al.*,

and

STEPHEN S. SANGER, JR., on behalf of himself and all others similarly situated,

Petitioners,

VERSUS

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, *et al.*,

and

JENNY MOTT McWILLIAMS, a minor, and DAVID JOHNSON McWILLIAMS, a minor, who sue by WILLIAM ROBERT McWILLIAMS, their father and next friend, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS McWILLIAMS, ET AL., IN OPPOSITION

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October, 1969

OKLAHOMA LITHOGRAPHING CO., 810 W. EAST, OKLAHOMA CITY, PH. CE 8-0580

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OCTOBER TERM, 1969

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS McWILLIAMS, ET AL., IN OPPOSITION

OPINIONS BELOW

The Petition for the Writ adequately shows the Opinions and Orders below.

JURISDICTION

The Petition for the Writ shows the jurisdictional grounds.

QUESTIONS PRESENTED

1. Whether a Writ of Certiorari should issue to review a stay order of the court of appeals where:

In the late spring of 1969, the Oklahoma City School Board, which was under the continuing jurisdiction of the district court, decided that it was not then feasible to make changes in existing school attendance boundaries in an attempt to achieve racial balance. The school board decided that racial balance could be obtained by an active recruitment program in implementation of the existing majority to minority transfer policy. The school board had been urged to make attendance boundary changes solely for the purpose of assigning more white students to the four fully integrated paired schools. The trial judge forced boundary changes upon the school board designed to establish a greater ratio of whites to blacks in two of the paired schools, namely, Harding and Northeast. The boundary changes, because of the distances involved, required transportation. The order forced white and black children to attend schools far more distant than the ones they otherwise would attend. Because of the constitutional and legal questions raised by the affected students, and the imminence of the 1969-70 school term, the court of appeals stayed the order of the trial judge until a complete desegregation plan scheduled for presentation by November 1, 1969, had been considered by the trial court. The court

of appeals stated it would expedite any appeal respecting the comprehensive plan.

We do not agree with Petitioners that a question is presented: "Whether Negro pupils have been denied Fourteenth Amendment rights to attend desegregated public schools. . . ."

2. Whether Chief Judge Murrah was disqualified to sit on the panel that stayed the trial court's order.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves only the correctness of a stay order issued by the court of appeals. No constitutional provisions or statutes are directly involved in this proceeding.

STATEMENT OF THE CASE

The only facts pertinent to the issue raised by the Petition for the Writ are those which relate to the order of August 13 entered by the district court (Appendix, 35a)[1] and the stay order entered by the Tenth Circuit (Appendix, 38a). On June 12, 1969, the school board routinely reported to the trial court its Plan for the 1969-1970 year (Appendix, 13a) in which, among other things, it stated that boundary changes in an attempt to achieve racial balance are not feasible at this time and stated its opposition to mandatory or forced bussing of pupils (Appendix, 19a). This plan was

[1] All references herein to the Appendix are to the Appendix to the Petition for a Writ of Certiorari

a further implementation of the previously approved Plan in operation. The court allowed interested parties 20 days from that date to respond. No response was made by Plaintiff Dowell. Plaintiff Sanger, a white intervenor, responded in opposition to the Plan apparently because it did not make boundary changes that would include more white students in the attendance areas of four schools previously paired by an order of the district court. The McWilliams class intervened as of right in support of the school board plan and against boundary changes resulting in compulsory transfers to achieve a racial balance.[2] After a pretrial, the trial court ordered Respondents' Complaint in Intervention stricken for failure of counsel to waive Respondents' right of appeal from any order of the trial court, and Respondents sought a writ under Rule 21(a), Federal Rules of Appellate Procedure.[3] Upon hearing, the court of appeals found Respondents were entitled to intervene as of right and vacated the trial court order striking their Complaint.[4]

Trial was had. The court ordered the school board to prepare a supplement to its Plan that would make boundary changes designed to increase the white to black ratio in Harding Junior and Northeast High Schools.

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[2]The Motion for Leave to Intervene, with Leave Granted to Intervene endorsed thereon, and the Complaint in Intervention are attached as Exhibit 5 to Respondents' Petition for Writ under Rule 21(a) in No. 348-69 in the court of appeals following page 3 of the Supplemental Certiorari Record filed by Petitioners.

[3]See record on appeal in No. 348-69 in the court of appeals indexed as page 3 of the Supplemental Certiorari Record filed by Petitioners.

[4]The Order is attached as Exhibit 1 to Respondents' Motion for Stay Pending Appeal in No. Misc. 474 in the court of appeals indexed as page 3 of the Certiorari Record filed by Petitioners.

Acting in response to the instructions of the court (Appendix, 20a), the board filed a boundary change supplement which made more extensive boundary changes than that proposed by the Sanger Intervenors at the trial, and which affected hundreds of pupils not previously affected. This Supplemental Plan was forthwith approved by the trial court without a hearing (Appendix, 9a, 11a). It was made effective for the 1969-1970 school year. Three elementary attendance areas and portions of two others were added to the Harding-Northeast schools. Additionally, 109 black students in the 10th and 11th grades in the Longfellow attendance area were transferred from Northeast High School, causing them to be transported without their consent a distance from five and one-half to seven miles across the City of Oklahoma City to a predominantly white school in a noncontiguous attendance area with all the attendant hazards and dangers of transportation (Appendix, 20a).

In the same order the court directed the school board to file a comprehensive Plan by November 1, 1969.

The McWilliams class asked the court of appeals to stay that part of the trial court's order effecting the boundary changes and transfers. The court of appeals had the benefit of all briefs available to the trial court, heard unlimited oral argument on two occasions and had before it a record sufficient to enable it to make an informed judgment as to the questions raised by the request for a stay. The court of appeals stayed and vacated the trial court's order insofar as it pertained to the boundary changes, pointing out that any appeal after the comprehensive Plan had

been presented as ordered by the trial judge would be procedurally expedited (Appendix, 38a).

Although the trial court made no findings of fact and conclusions of law, the oral remarks of the trial judge which were before the court of appeals when it was considering the application for a stay (Appendix, 1a-10a) show that the trial judge found that the school board was acting in good faith (Appendix, 1a, 5a) and show that the boundary changes which were forced on the school board by the trial court were for the sole purpose of establishing an increased ratio of whites to blacks in Harding Junior High School and Northeast High School (Appendix, 5a-6a, 9a). There was no finding or suggestion that, following an earlier decision of the court of appeals in the same case, existing attendance boundaries had been drawn in bad faith or to further and perpetuate racial discrimination.[5] Indeed, there is no finding at all by the court of any purposeful segregation by the school board. One of the school board members pointed out to the trial judge that the court was giving the school board no opportunity to demonstrate that the plan it had proposed and submitted to the court for active recruitment of majority to minority transfers would in practice work (Appendix, 7a).

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[5]In its opinion, the court of appeals stated: "The majority to minority transfer plan, in conjunction with the attendance boundary plan, eliminates any question about Constitutional infirmities of the attendance boundary plan being followed in Oklahoma City." *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F.2d 158, 166 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967).

At page 6a, Appendix, the trial court stated:

> "The Court holds and finds that this School Board must, within a period between now and October 30th, prepare and submit to the people a long range integration-desegregation plan.
>
> "The Court holds and finds that thereafter the plan will be heard and it will be determined what to be done about it."

In this posture, the case came to the court of appeals for a stay order, the McWilliams class contending that they were being assigned to certain already-integrated schools because they were white, in violation of their constitutional rights not to be discriminated against solely because of their race, and that assignment to those schools would necessitate their transportation to said schools contrary to the Civil Rights Act of 1964, 42 U.S.C.A. §2000c-6(a), 78 Stat. 248.

REASONS THE WRIT SHOULD NOT BE GRANTED

1. The decision of the court below is not in conflict with any decision of this Court.

The court of appeals has decided no question contrary to any decision of this Court. The court of appeals has decided no question of national importance relating to the timing of public school desegregation. The court of appeals stayed an order of the district court, involving temporary and partial boundary changes (see trial court's remarks, Appendix, 6a) which raised constitutional and legal issues, until the trial court had considered and approved a full and comprehensive plan it had ordered presented.

2. The court of appeals has decided no important question of federal law.

The court of appeals has decided no important federal question. It merely postponed decision on the constitutional question presented by the McWilliams class until the school board had presented to the court, as the district court ordered, a comprehensive desegregation plan which might render moot the constitutional issue of racial discrimination against the McWilliams class raised by the piecemeal action of the trial court.

As recognized by Petitioners at page 25 of their Petition, the court of appeals realized that issuance of a stay, in effect, would determine the boundary changes for the 1969-1970 school year. Having determined that a stay should be granted (Appendix, 43a) pending the scheduled presentation of a comprehensive plan to the trial court, the court of appeals vacated the order of August 13 and remanded for consideration of the comprehensive plan. The order of the court of appeals was, by its language and reasoning, clearly intended as a stay order and, as such, does not require for its validity a finding of error or abuse of discretion by the trial court.

It is obvious that the court of appeals thought there was some substance to the constitutional issue presented by the McWilliams class, and that, balancing the competing interests, it appeared better in the public interest not to consider piecemeal the important questions inherent in the Oklahoma City situation (Appendix, 43a).

Mr. Justice Harlan stated in *O'Rourke, et al.* v. *Levine*, 80 S.Ct. 623, 4 L.Ed.2d 615 (Opinion in Chambers, March 5, 1960):

> "The Circuit Justice will not disturb, except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it."

The same considerations are applicable in a determination made by the whole court as to whether certiorari should be granted in this case to review the correctness of a decision on the issuance of a stay clearly within the discretion of the court of appeals. *American Construction Co.* v. *Jacksonville, T.&K.W.R. Co.*, 148 U.S. 372, 384; *Cobbledick* v. *United States*, 309 U.S. 323, 324-5; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258.

This Court should note that the court of appeals had heard extensive argument in the Oklahoma City case and in a somewhat similar case arising in Denver,[6] and had considered the briefs submitted. The Denver case is clearly distinguishable from the Oklahoma City case as the district judge in the Denver case had made a finding of deliberate segregation on the part of the school board and had granted an injunction.[7] No such situation is present in the Oklahoma City case.

This Court should also note that there was a difference of opinion between the trial judge and the school board as to whether the school board's active recruitment plan, which had been in effect less than a month, would in practice work. The majority of the school board thought its

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[6]The Denver case was considered together with this case by the court of appeals as stated in its order (Appendix 42a).

[7]See: *Wilfred Keyes, et al.* v. *School District Number One, Denver, Colorado, et al.*, not yet reported; opinion of Mr. Justice Brennan in Chambers, August 29, 1969.

plan would work. The trial judge thought it would not and forced the school board to supplement the plan in accordance with the recommended boundary changes recommended by witness Wheat (Appendix, 6a, 9a). The court of appeals obviously was convinced that serious questions were presented by the McWilliams class which might disappear if a long-range plan were considered rather than a piecemeal solution which involved only two schools that were already fully integrated. Although Mr. Justice Brennan may have believed that an injunction was involved when he was requested to stay the order of the court of appeals, the case is not now and has never been in this posture. There can be no question about the power of the court of appeals to grant the stay. Rule 62(g), Federal Rules of Civil Procedure; Rule 8, Federal Rules of Appellate Procedure. The court of appeals obviously had a record before it sufficient to enable it to make a considered judgment as to whether a stay should issue.

In the court of appeal's consideration of the probability of success on the merits of Respondent's claims, there could be no question that the McWilliams class were assigned to Harding Junior High and Northeast High School *solely because they are white.* There was no reason for the change of school boundaries but to capture more white pupils for two schools which had student bodies comprised almost equally of both whites and blacks. The only reason for the assignment was the hope of establishing a greater ratio of whites to blacks in the schools. There could be no question that the transportation of these assigned pupils to the more remote schools would be required. Respondents did not claim before the court of appeals, nor would they

here, that race cannot be a consideration among the germane factors to be considered in establishing school boundary lines (see *Wanner* v. *County School Board of Arlington County, Va.*, 357 F.2d 452 (4th Cir. 1966)), but they did contend that when race is the *sole* consideration unequally applied, a violation of the Fourteenth Amendment occurs. The court of appeals was aware that this Court has never held that a district judge may impose his will upon a school board absent a showing that the school board is refusing to act to eliminate racial discrimination in public education, *Wanner* v. *County School Board of Arlington County, Va., supra,* at page 456, or that there must be a racial balance in every school. The court of appeals was cited decisions in other circuits that would make a thoughtful judge pause before dismissing the constitutional issues raised by the McWilliams class; such as: *Goss* v. *Board of Education of Knoxville, Tennessee,* 406 F.2d 1183 (6th Cir. 1969);[8] *Bell* v. *School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964); and *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967). It was no doubt familiar with *Springfield School Committee* v. *Barksdale, Jr., et al.,* 348 F.2d 261 (1st Cir. 1965), in which the court of appeals reversed an order which required the school board to prepare and present a plan which would "eliminate to the fullest extent possible racial concentration . . . within the framework of effective educational procedures, as guaran-

[8]Decided subsequent to this Court's opinions in *Green* v. *School Board of New Kent County, Virginia,* 391 U.S. 430 (1968); *Raney* v. *Board of Education of the Gould School District,* 391 U.S. 443 (1968); and *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.,* 391 U.S. 450 (1968).

teed by the equal protection clause of the Fourteenth Amenment. . . ." The appellate court, after pointing out that other factors must be considered as well as race, said at page 264:

> "Certain statements in the opinion, notably that 'there must be no segregated schools,' suggest an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs. We can accept no such constitutional right. Cf. Bell v. School City of Gary, 7 Cir., 1963, 324 F.2d 209, cert. den. 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; Downs v. Board of Education, 10 Cir., 1964, 336 F.2d 988, cert. den. 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800."

We submit that the court of appeals was correct in apparently concluding that there was substance to the constitutional and legal issues raised by Respondents below sufficient for it to conclude that a stay of the trial court's order regarding boundary changes should issue.

3. No Judge of the panel below was disqualified.

Petitioners assert that Chief Judge A. P. Murrah of the United States Court of Appeals for the Tenth Circuit was disqualified to participate in the decision below by 28 U.S.C. §47 which provides that "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." Judge Murrah sat on a statutory three-judge court in 1962[9] which entered an order finding the only issue before it was a factual one that did not address itself to a three-judge court, holding the court to be with-

[9]Petition for a Writ of Certiorari, pp. 8-10.

out jurisdiction and reassigning the case to the trial judge (Appendix, 47a). "[T]he sole criterion under the statute is, does the case in the circuit court of appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below?" *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U.S. 339, 344 (1913). The only question "tried or heard" by Judge Murrah as a part of the three-judge statutory court was whether it had jurisdiction, a question that must be determined independently of the merits. Petitioners assert that the three-judge court sustained the school board's defense by quoting that part of the order which states:

> "It further appears from the evidence that there has been no order made or promulgated by the defendants acting under the above statute [70 Okla. Stat. 1961, Section 4-22], within the purview of 28 U.S. Code Section 2281, which the plaintiff presents or points out to be unconstitutional by discriminating against the plaintiff and his class by reason of race or color." (Appendix, 47a).

To the contrary, it is clear that the three-judge court was adverting to a lack of affirmative evidence sufficient to sustain a finding of jurisdiction under Section 2281. As shown in the trial judge's opinion[10] after the three-judge court was dissolved and a full trial was had, factual evidence introduced at the trial showed a course of conduct by the school board since 1955 first reduced to a formal written policy on April 10, 1963 (after the three-judge court had dissolved), known as the minority to majority transfer

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[10] *Dowell* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427, 440-442 (W.D. Okla. 1963).

policy. It was this course of conduct which was held by the trial court to be an unconstitutional application of the statute involved, cited above in the quotation.

Respondents submit that the issues before the court of appeals in connection with its Motion for Stay did not involve "in any degree matter upon which he [Judge Murrah] had occasion to pass in the lower court." *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899). See also: *United States* v. *Perlstein*, 126 F.2d 789, 806 (3rd Cir. 1942), *cert. denied*, 316 U.S. 678 (1942); *Lee* v. *United States*, 91 F.2d 326, 331-332 (5th Cir. 1937), *cert. denied*, 302 U.S. 745 (1937).

Contrary to Petitioners' assertion, the issues before the court of appeals on Respondents' Motion to Stay did not include "whether the board is really complying with its duty under *Brown*, how fast desegregation must proceed, whether the schools have been fully desegregated or more must be done, [or] whether the board has affirmative obligations to change the segregated patterns."[11]

Where disqualification exists, this Court has held the remedy to be reversal and remand for consideration by a properly constituted court, rather than considering the case on the merits, pointing out that otherwise this Court would "be called upon, not to review the action of a court below, organized conformably to law, but to decide . . . questions which the law contemplated should be previously passed upon by an inferior court lawfully constituted." *Wm. Cramp & Sons S.&E.B. Co.* v. *International*

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[11]Petition for a Writ of Certiorari, p. 29.

Curtis Marine Turbine Co., 228 U.S. 645, 651 (1913). The quoted language is particularly cogent in respect to Petitioners' suggestion to remand the case to the district court to carry out the steps contemplated by the August 13, 1969 trial court order.[12] The effect of adopting Petitioners' suggestion would be to decide Respondents' constitutional and other claims adversely to them without their appeal having ever been heard on its merits.

Although 28 U.S.C. §1254(1) authorizes review of a pending case by grant of a writ of certiorari to a court of appeals before judgment, Rule 20 of this Court states that such writ "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." There is no such showing here.

[12]The further steps contemplated are the submission by the school board to the district court of a full and comprehensive plan for desegregation. The stay order of the court of appeals, in effect, did not disturb this portion of the district court order (Appendix, 43a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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October, 1969

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No. 603

FILED
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IN THE

Supreme Court of the United States

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENT THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS ET AL., IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 603

ROBERT L. DOWELL, an infant, who sues by A. L. DOWELL, his father and next friend, et al.,

and

STEPHEN S. SANGER, JR., on behalf of himself and all others similarly situated,

Petitioners,

versus

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, et al.,

and

JENNY MOTT MCWILLIAMS, a minor, and DAVID JOHNSON MCWILLIAMS, a minor, who sue by WILLIAM ROBERT MCWILLIAMS, their father and next friend, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS IN OPPOSITION

OPINIONS BELOW

The Petition for the Writ adequately shows the Opinions and Orders below.

JURISDICTION

The Petition for the Writ shows the alleged jurisdictional grounds.

QUESTIONS PRESENTED

1. Whether a Writ of Certiorari should issue to review a stay order of the court of appeals.

2. Whether Chief Judge Murrah was disqualified to sit on the panel that stayed the trial courts order.

3. That justice can best be served by denying the Petition for Writ of Certiorari and remanding the case to the Court of Appeals Tenth Circuit where appeals were docketed October 14, 1969 as case No. 541-69 and No. 542-69. That the Court of Appeals Tenth Circuit may determine all the issues between all of the parties and any party desiring may then file a petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the correctness of a stay order issued by the court of appeals. No constitutional provisions or statutes are directly involved in this proceeding.

STATEMENT OF THE CASE

The facts pertinent to the issue raised by the Petition for the Writ are those which relate to the order of August 13, 1969, entered by the district court (Appendix, 35a to Petition For Writ) and the stay order entered by the Tenth Circuit (Appendix 38a). References to the Appendix are to the Appendix to the Petition for a Writ of Certiorari. On June 12, 1969, the school board filed its Plan for the 1969-1970 year (Appendix, 13a) in which it stated that boundary changes in an attempt to

achieve racial balance were not feasible at that time and stated its opposition to mandatory or forced bussing of pupils (Appendix 19a). A further implementation of the previously approved plan in operation.

Trial was had. The Court ordered the school board to prepare a supplement to its Plan that would make boundary changes designed to increase the white to black ratio in Harding Junior High School and Northeast High School.

Acting in response to the instructions of the court (Appendix, 20a), the board filed a boundary change supplement which made more extensive boundary changes which affected hundreds of pupils not previously affected. This supplemental Plan was forthwith approved by the trial court without a hearing (Appendix, 9a, 11a). It was made effective for the 1969-1970 school year.

In the same order the court directed the school board to file a comprehensive Plan by November 1, 1969.

The McWilliams class asked the court of appeals to stay that part of the trial court's order effecting the boundary changes and transfers. The court of appeals stayed and vacated the trial court's order insofar as it pertained to the boundary changes, pointing out that any appeal after the comprehensive Plan had been presented as ordered by the trial judge would be procedurally expedited (Appendix, 38a).

At page 6a, Appendix, the trial court stated:

> "The Court holds and finds that this School Board must, within a period between now and October 30, prepare and submit to the people a long range integration-desegregation plan.
>
> "The Court holds and finds that thereafter the plan will be heard and it will be determined what to be done about it."

On August 29, 1969, Mr. Justice Brennan, on application of petitioners, vacated the order of the court of appeals and on September 2, after filing of briefs by Respondent McWilliams continued his order in effect pending disposition of the Petition for Certiorari to be filed in this case.

REASONS THE WRIT SHOULD NOT BE GRANTED

1. The decision of the Court below is not in conflict with any decision of this court and the court of appeals has decided no important question of federal law.

The Respondents McWilliams class has extensively briefed this argument in their brief in opposition and the Respondent School Board does not have any additional authorities or argument to present in its brief.

2. Chief Judge A. P. Murrah was qualified to participate in the case below.

Respondent School Board adopts the brief and argument of the Respondents McWilliams. Any citation of authority by the School Board would be repetitious.

3. That Justice can best be served by denying the petition for Writ of Certiorari and remanding the case to the Court of Appeals, Tenth Circuit where appeals were docketed as cases #541-69 and #542-69.

Respondent School Board shows the court that appeals have been docketed in Case #541-69 and case #542-69 in the Court of Appeals, Tenth Circuit. These two appeals were docketed pursuant to notices of appeal filed September 12, 1969, by the respondent School Board. The record on appeal is complete and contains a complete transcript of the testimony involved in this case.

The Respondent School Board submits there is now before the Court of Appeals a case in which all parties can be heard regarding the trial court's Order and the issues determined in a orderly fashion. There is no

question in this case at this time which would warrant a granting of the petition for Writ of Certiorari by this Court. The order of Justice Brennan entered September 3, 1969, in effect provided the relief which Petitioner sought in this case as the Plan for the school year 1969-1970, approved in the Order of August 13, 1969 (Appendix) is in operation at the present time in Oklahoma City, Oklahoma. A remand in this case would best serve the ends of justice to all concerned. The Petition states as an additional ground that the Court below has so far departed from the accepted practice as to require this Court's supervision. Respondent School Board submits this question is now moot and does not constitute any valid reason for granting the Writ. Respondent School Board again reiterates that two cases are now pending in the Court of Appeals with a complete record of pleadings and the transcript of testimony. The Petitioners chief complaint of the action by the lower court was the lack of a record. This is no longer a valid complaint as the record on appeal has been docketed as of October 14, 1969. This court has not hesitated to dismiss where it appears that the case is not appropriate for adjudication; Rice vs. Sioux City Memorial Park Cemetary 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614; See also footnote #2. Such is the case at bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted

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October, 1969

SUPREME COURT OF THE UNITED STATES

October Term, 1969

ROBERT L. DOWELL, AN INFANT, ETC., ET AL., *v.* BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 603. Decided December 15, 1969

PER CURIAM.

In this school desegregation case, the District Court for the Western District of Oklahoma, by order entered August 13, 1969, approved respondent Oklahoma City School Board's proposal for furthering desegregation of some Oklahoma City schools by revising school attendance boundaries effective September 2, 1969, the start of the 1969–1970 school year. The order also decreed that the School Board prepare and submit on or before November 1, 1969, a comprehensive plan for the complete desegregation of the entire school system. Intervenors of the "McWilliams Class" appealed to the Court of Appeals for the Tenth Circuit from the provision of the order which approved implementation of the School Board's proposed boundary changes by September 2, 1969, and sought a stay of that provision pending decision of the appeal. The Court of Appeals, on August 27, 1969, instead of limiting relief to the requested stay, summarily vacated the District Court's approval of the School Board's proposal. The Court of Appeals held that consideration of the proposal was inappropriate "at this stage of the proceedings" and should await the District Court's "consideration and adoption of a full and comprehensive plan for the complete desegregation and integration of the Oklahoma City School system as contemplated in the court's order of August 13, 1969." — F. 2d —, — (1969).

The petition for certiorari is granted.[1] The Court of Appeals erred in holding that the District Court's approval of the School Board's plan must be vacated because consideration of the proposal was inappropriate except in the context of a comprehensive city-wide plan. The burden on a school board is to desegregate an unconstitutional dual system at once. *Green* v. *County School Board*, 391 U. S. 430, 439 (1968); *Alexander* v. *Holmes County School Board*, 396 U. S. 19 (1969). Since the District Court ordered the desegregation measures into effect, and since the petitioners did not object to their scope, the Court of Appeals should have permitted their implementation pending argument and decision of the appeal. *Alexander* v. *Holmes County School Board*, *supra*. The order of the Court of Appeals is therefore vacated and the case is remanded to that court promptly to hear and determine, consistently with *Alexander*, all pending appeals from the District Court order.[2]

It is so ordered.

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[1] The petition was filed pursuant to an expedited schedule specified by MR. JUSTICE BRENNAN when on petitioners' application he, as Acting Circuit Justice, vacated the order of the Court of Appeals and reinstated that of the District Court, pending action by this Court on the petition.

[2] We are informed by the parties that the School Board on September 12, 1969, also filed an appeal from the District Court's approval of the Board's proposal, and another appeal from the District Court's denial on September 11, 1969, of the Board's application for amendment of the August 13 order to extend from November 1, 1969, to March 31, 1970, the time for filing of a comprehensive desegregation plan for secondary schools. The District Court granted the Board's application as to a plan for desegregation of the elementary schools.